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Supreme Court of the United States

OCTOBER TERM, 1907. No. 140.

SHAWNEE COMPRESS COMPANY, GULF COMPRESS COMPANY, T. F. STUBBS, ET ALS.,
Appellants,

vs.

NEIL P. ANDERSON, B. L. ANDERSON AND MORRIS E. BURNEY, CO-PARTNERS AS NEIL P. ANDERSON & COMPANY, F. E. ANDERSON, M. D. ANDERSON AND W. L. CLAYTON, CO-PARTNERS AS ANDERSON, CLAYTON & CO.,
Appellees.

No. 20434

BRIEF OF APPELLANTS.

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This action was commenced by the appellees herein on the second day of May, 1905, in the District Court of Pottawatomie County, Oklahoma Territory, in which court the said appellees filed their petition against the Shawnee Compress Company and the Gulf Compress Company, both corporations, to enjoin the said compress companies and their officers from executing a certain contract of lease, by the terms of which said lease the

Shawnee Compress Company let and demised its compress plant in the City of Shawnee, Territory of Oklahoma, to the Gulf Compress Company for a period of five years, beginning the first day of September, 1905, and terminating on the 31st day of August, 1910, for the annual rental of six thousand dollars, payable in monthly installments of five hundred dollars each, during the period of the said lease. The said petition will be found on page 10 of the printed record, and a copy of the said lease is attached to such petition, marked Exhibit "F" for identification, and is found on page 18 of the printed record.

Subsequently, and on May 13th, 1905, the appellees filed an amended petition, which is found on page 26 of the printed record. The said petition and its amendment having been duly challenged by motions and demurrer, which being in substance overruled by the trial court, the appellants, as defendants in the said court filed their answer, which is incorporated in the printed record at pages 34 to 40, inclusive, and subsequently, to-wit, on the 27th of May, 1905, the said appellees having challenged the sufficiency of the said answer by demurrer, which said demurrer was overruled by the court, the plaintiffs filed their reply, which said reply is incorporated in the printed record at page 42, and thereafter, on the 16th day of September, 1905, plaintiffs in the trial court, appellees herein, with leave of court filed an amendment to their amended petition; which said amendment is incorporated in the printed record at pages 43 and 44.

This is a controversy between the minority stock-

holders and the corporation, its officers, directors and majority stockholders.

The issues presented by the said petition and its amendments, the answer and reply, are briefly as follows: Appellees herein, in their petition in the trial court, alleged that the Shawnee Compress Company was a corporation duly organized under and by virtue of the laws of the Territory of Oklahoma, with power to build, own and operate a compress at the City of Shawnee, and that the said appellees, plaintiffs in the court below, were stockholders in such corporation, and that T. F. Stubbs and W. H. Beatty, two of the appellants herein, defendants in the court below, were stockholders in such corporation and the owners and holders of a majority of such stock, and that said Stubbs was president of the said corporation, and Beatty was secretary, and both were members of the board of directors; that J. M. Aydelotte, prior to the 24th day of April, 1905, had been and acted as the president of the said corporation, the Shawnee Compress Company; that the Gulf Compress Company was a corporation organized under the laws of the State of Alabama, and as such was authorized to own, construct and operate compresses, and that C. C. Hanson was its president, and R. E. L. Martin was its secretary; that on the 26th day of April, 1905, the said T. F. Stubbs and W. H. Beatty, as president and secretary, respectively, of the Shawnee Compress Company, assumed to execute a certain written lease to the said Gulf Compress Company on behalf of the Shawnee Compress Company, and that on the first day of May, 1905,

a meeting of the pretended board of directors of the Shawnee Compress Company was held in the City of Shawnee, which said meeting was attended by T. F. Stubbs, F. E. Anderson and W. H. Beatty, and at the said meeting the minutes of the previous meeting were approved, over the written protest of the said F. E. Anderson; the appellees, plaintiffs in the court below, contended that the charter issued by the Territory of Oklahoma to the Shawnee Compress Company required the election of five directors, and that the action of the stockholders of the said Shawnee Compress Company in electing but three directors, rendered such election invalid and void, and that the said T. F. Stubbs and W. H. Beatty were not directors of the said corporation, and in such petition the said appellees, being plaintiffs below, alleged that all of the actions of the said board of directors, in the execution of the said lease, and in all other matters in connection therewith, were irregular, invalid and void and not binding upon the said corporation; appellees in said petition also contended that under the powers conferred upon the Shawnee Compress Company by its charter, that the Shawnee Compress Company had no authority to enter into a lease letting and demising all of its properties for the full period of five years to the Gulf Compress Company, and that such action and such pretended lease was in excess of its chartered powers, was *ultra vires* and void. Appellees in their amended petition and in their amendment to their amended petition allege that the said Gulf Compress Company, one of the appellants

herein, being a corporation organized under the laws of some other state or territory than the Territory of Oklahoma, had been for some years last past engaged in the business of leasing and operating competing presses for the purpose of monopolizing, so far as possible, the business of compressing cotton in a large portion, if not all, of the territory embraced in the cotton raising districts of the United States, and that the said pretended lease which the said Beatty and Stubbs attempted to negotiate to the said Gulf Compress Company, was procured on the part of certain of the officers of the said company in furtherance of their scheme to further monopolize the compress business and restrict competition in the same, and that the said Gulf Compress Company had theretofore leased the compresses at Oklahoma City, Oklahoma Territory, and at South McAlester and Muskogee, Indian Territory, and that the said Gulf Compress Company was, in its operation and method of conducting business, a trust and combination in restraint of trade and commerce, and had procured said pretended lease contract with the said Shawnee Compress Company for the purpose of furthering its said fraudulent combination and conspiracy in restraint of trade, in violation of the federal anti-trust law and the anti-trust laws of the Territory of Oklahoma, and that it was the purpose and design of the officers of the said Gulf Compress Company to increase the charges for compressing cotton in a sum aggregating about ten cents a bale, and by so doing it would entail a loss upon the purchasers of said cotton equal to said extra charges.

To this petition and its amendments the appellants herein filed their answer, denying generally the allegations thereof, but admitting the incorporation of the Shawnee Compress Company and the Gulf Compress Company, and admitted that T. F. Stubbs and W. H. Beatty were respectively president and secretary of the Shawnee Compress Company, and stated specifically the amount of stock held by each of the stockholders of the Shawnee Compress Company, but alleged that the appellants, Neil P. Anderson & Company, and Anderson, Clayton & Company had participated in the stockholders' meeting of the Shawnee Compress Company by their duly authorized agents and partners, respectively, B. L. Anderson for Neil P. Anderson & Company, and F. E. Anderson for Anderson, Clayton & Company; the said appellants admitted in their answer the execution of the said lease contract and alleged in connection therewith that the said Shawnee Compress Company was largely indebted, in a sum exceeding seventeen thousand dollars and was wholly unable to meet the same, and that the said indebtedness was pressing; that $6,000.00 of the same was owing to the Shawnee National Bank, and the same was matured, and the officers of the Shawnee Compress Company had endeavored to procure an extension of the time of payment of the said indebtedness with the said bank, but the said bank had declined to extend the same and was threatening to enforce payment of the said indebtedness; that $11,500.00 of such indebtedness was due the Webb Press Company, Limited, and was secured by a first mortgage upon the properties of the

company, and was long past due; and the said Webb Press Company, Limited, was threatening to enforce payment of such indebtedness; that the said Shawnee Compress Company in order to obtain moneys with which to pay the said indebtedness, was compelled to execute the said lease to the Gulf Compress Company, a part of the consideration of the said lease being an agreement to loan to the said Shawnee Compress Company a sufficient amount to take up said indebtedness due the Shawnee National Bank, and to provide for the indebtedness due to the Webb Press Company, Limited, and that it had executed the said lease for such purposes and none other, and that the said Shawnee Compress Company could not procure the money to meet its matured obligations in any other manner, and except for said contract of lease the properties of the said Shawnee Compress Company would have been sold at great sacrifice. The said appellants further alleged that the appellees, Neil P. Anderson & Company and Anderson, Clayton & Company, were cotton buyers operating within the said Territory of Oklahoma, and that the said firms were engaged in the buying and shipment of cotton in different portions of the said territory, and in order that they might have an unfair advantage over other persons engaged in said business, had conspired for the purpose of forming a monopoly of all of the compresses in the said territory under their management and control, and in order to hamper and harass such other cotton buyers, and to prevent them from having their cotton compressed and shipped

with the rapidity that the said Andersons could do so, by reason of their control and management of the said compression, and in order to obtain other unfair advantages over their competitors, that the said Andersons had purchased stock in the compresses located at Chickasha and Pauls Valley in the Indian Territory, and at Snyder, Hobart, El Reno and Shawnee in Oklahoma Territory, and that the said Andersons had endeavored to obtain a majority of the stock of the Shawnee Compress Company, and knowing that Beatty and Stubbs were involved and in great need of monies, had in all ways attempted to oppress said Beatty and Stubbs and compel them to sell their said stock to the said appellees without any sufficient or adequate consideration, and had conspired together to compel the said Shawnee Compress Company, which they knew was pressed, as aforesaid, by matured indebtedness, to sell and convey its property to them, at a wholly inadequate consideration, to-wit, the sum of twenty-five thousand dollars; and that to prevent the said sacrificial sale of the properties of the said Shawnee Compress Company, that the said lease had been executed, and that its execution had been coerced by the wrongful acts of the said Andersons, who were at all of the said times members of the said board of directors of the said Shawnee Compress Company, and whose duty it was to assist the said Shawnee Compress Company to tide over its financial embarrassments, and that the said Andersons had commenced this suit for the purpose of declaring the said lease invalid, and thereby compelling the said Shawnee Compress Company to sell its

properties to pay its debts, or submit to a forced sale by its creditors, in order that the said Andersons might purchase and obtain the same; and therefore, by reason of the said wrongful acts of the said Andersons, who being plaintiffs in the court below, appellees herein, a court of equity would not assist or further their unlawful designs, and their hands being unclean, they should be denied any relief in said action, and denied generally that the said contract of lease directly or indirectly or unreasonably restrained trade or tended to unreasonably restrain trade, or to prevent competition, or to the establishment of a monopoly, and denied that the same was against public policy and void.

From these pleadings and the evidence offered in the case five issues were formed:

1st. Was the contract of lease such an abandonment of the corporate franchises by the Shawnee Compress Company as to be *ultra vires*?

2nd. Was the said leasing rendered necessary, and therefore valid, by the financial embarrassments of the Shawnee Compress Company?

3rd. Was the said contract of lease, by its terms or the circumstances surrounding its execution, of such nature as to tend unreasonably to restrain trade, prevent competition or to create a monopoly?

4th. Was the said contract entered into in such manner and by such officers of the Shawnee Compress Company as to bind the said corporation?

5th. Were the plaintiffs below in equity with clean hands?

The trial court found all the issues in favor of the defendants in that court, appellants herein, and on appeal to the Supreme Court of the Territory, the Supreme Court of the Territory found the first and second issues in favor of the appellants herein, declined to pass upon the fourth and fifth issues; and found the issue herein classified as No. 3 in favor of the appellees, and on this issue the Supreme Court of the Territory reversed the judgment rendered in the District Court of Pottawatomie County, Oklahoma Territory, and directed the said court to render judgment in favor of the plaintiffs below, appellees herein. From that decision an appeal is taken to this court by the defendants in the court below.

ARGUMENT.

The nine assignments of error may be presented under three sub-divisions:

1st. That the Supreme Court of the Territory erred in holding that the contract of lease from the Shawnee Compress Company to the Gulf Compress Company, of date of the 26th day of April, 1905, and found in the printed record on pages 18 to 21, inclusive, tended to create a combination unreasonably in restraint of trade, the prevention of competition and the establishment of a monopoly, therefore, being against public policy and void.

2nd. The Supreme Court of the Territory erred in refusing to deny to the appellees, plaintiffs in the courts below, the relief by them sought in said action, because they had come into equity with unclean hands.

3rd. The Supreme Court of the Territory erred in not awarding a new trial of the said cause, instead of reversing the said cause and entering an order directing the trial court to enter judgment for the plaintiffs.

There were numerous other questions presented in the Supreme Court of the Territory of Oklahoma, which will, without doubt, be re-urged in this court, and which we will anticipate and after discussing our assignments of errors will cite the authorities supporting our contention upon these anticipated questions.

FIRST—PUBLIC POLICY.

The Supreme Court of Oklahoma by Justice Pancoast, page 219 of the printed record, say:

"The second proposition contended for, however, involves the consideration of another and far more important question, which it becomes the imperative duty of this court to pass upon. Does the contract, or so much thereof, as is set out above, tend to the unlawful restriction of competition in the business which it concerns, and thereby furnish an illegal monopoly of the said business in the cotton growing communities, and this, in contemplation of the character of the transactions out of which the contract grew, the plan and mode of operation of the business of the leasing or purchasing company, and the objects or results accomplished, in fact intended or sought to be brought about?"

At page 223 of the said printed record the same Justice, speaking for the Supreme Court of Oklahoma, says:

"In view then, of the evident purposes of the leasing company, as indicated by its plan of organization, its abundant available treasury stock, its control, together with the Atlantic Company of fifty-two compresses scattered at different points over the southern states, the area affected, the unlimited operation of the restraining clause, the general situation and the interests concerned, considerations of public welfare and regard for the public interests in the community affected, require us to hold that this lease is wider in scope and more restrictive in operation than necessary for the proper protection of the Gulf Compress Company in its lease, and being executed in furtherance of a monopolistic design, inimical to the best interests of the public, is in unreasonable restraint of trade and therefore void."

The Supreme Court of the Territory regarded that the Gulf Compress Company possessed a monopolistic design inimical to the best interests of the public because its field of operations embraced the cotton growing states and it was capitalized at one million dollars, of which six-tenths, or six hundred thousand dollars remained in the treasury in the shape of treasury stock, the form most convenient and most conveniently available for instant application; and that it, with another and distinct corporation, the Atlantic Compress Company, controlled the operation of fifty-two compresses, out of which it, the Atlantic Compress Company, owned but six, holding the remainder by lease contracts, and that the officers of

neither of these companies had declared a dividend since their incorporation.

The Supreme Court of Oklahoma overlooked the nature and purpose of the organization of the Atlantic Compress Company. It was not organized to engage in compressing cotton for profit. The transportation companies issue bills of lading and collect transportation charges upon cotton in the uncompressed condition, but the carrier reserves the right of compression at its expense in transit. On page 75 of the printed record, in the last answer, Mr. Hanson, president of the Gulf Compress Company, explains the method of compression of cotton. The railroads charge what it called a flat rate for the transportation of cotton, and to diminish the number of cars required for such service, increase the density of the bales by compressing in transit, so that one car can do the service of three in transporting the cotton to market. The shipper is not concerned as to whether cotton is compressed or not. The shipper pays no part of the cost of compression and receives no benefit from its compression. The railroads east of the Mississippi river, desiring to do their compressing at a minimum cost, organized the Atlantic Compress Company. Its stockholders are exclusively railroad companies, and it cannot earn profits and does not declare dividends because it receives no pay for its compression. The Atlantic Company at the close of the season estimates the total cost of operating its many plants and apportions such expenses to the several

railroad companies, proportioned to the number of bales each company has had compressed (See printed record, pages 75 and 76).

The Atlantic Company is unconcerned about competition. Its stockholders compress their own cotton to reduce the bulk of the packages which they are transporting.

At the commencement of this action and at the trial of the same the Gulf Compress Company had leased three plants in Oklahoma and Indian Territory; one at Oklahoma City, one at Muskogee, and the one in controversy at Shawnee. The territorial Supreme Court condemn these three leases made by the Gulf Compress Company because of its alliance and similarity to the Atlantic Compress Company, and because the two companies had leased or purchased fifty-two compresses and did not earn profits or declare dividends. There is no support in the record of any alliance between the two compress companies and there is no similarity in the purpose of the corporations. One is organized by private parties for compressing cotton for profit, and the other for compressing for its stockholders, the carriers.

The only three independent acts of which the Gulf Compress Company is guilty, tending to unreasonably restrict trade, urged by the territorial Supreme Court, are:

a. That it has treasury stock unissued.

b. It has entered into a contract with the Shawnee Compress Company by which the Shawnee Compress Company agrees not to engage in business during the

life of the lease within fifty miles of the leased plant, and,

c. That the terms of the contract of lease do not obligate the Gulf Compress Company to operate the plant at Shawnee.

a.

The paid up capital of the Gulf Compress Company is $400,000.00, and its surplus for two years was only $20,000.00 (printed record page 83). Yet, because this company is authorized under its charter to issue more stock and because it has this small surplus, the territorial Supreme Court conclusively presumes that its object is to establish a monopoly. And because its president happens to be the president of another company the two are treated in effect as one and the same, although the record shows not a single stockholder in the Gulf Compress Company owns stock in the Atlantic Company, and the directors and the officers, with the exception of Mr. Hanson, and the methods of doing business are entirely different.

There certainly can be no force in the proposition that un-issued treasury stock imports an unlawful purpose in the organization of a corporation or impresses with illegality the plan and policy of its business. Believing that the custom of corporations to organize with only portion of the capital stock paid in, and the remainder reserved as treasury stock for future disposition, has become so general and has existed for such considerable length of time without having been regarded with sus-

picion, we shall submit this objection urged by the Supreme Court of the Territory of Oklahoma without further discussion.

b.

The cardinal error of the Supreme Court of Oklahoma is in holding that because the purchasing or leasing of the compress might thereby prevent that compress from entering into competition with the vendee or lessee is from its nature invalid because in restraint of trade. An act is not necessarily invalid because in restraint of trade, when the restriction of trade is an ancillary or incidental result. To be condemned by the law a contract must be an agreement between the parties to restrict trade, and such contract is invalid whatever may be the result of its operation. If a purchaser buys one or more compresses and operates them as his own property, competition is to that extent restricted, but being incidental, such contract is not invalid, and will not be held invalid because the purchaser may have taken a contract from the seller obligating the seller not to carry on or resume such business.

Fowle, et al. vs. Park, et al., 131 U. S., 88.
Gibbs vs. Gas Co., 130 U. S., 396.
Cin. P. B. S. & P. P. Co. vs. Bay, et al., 200 U. S., 179.
United States vs. Joint Traffic Association, 171 U. S., 505.
Bement & Sons vs. National Harrow Co., 186 U. S., 70, 92.
Navigation Company vs. Windsor, 20 Wall., 64, 68.
Diamond Match Co. vs. Roeber, 106 N. Y., 473
Tode vs. Gross, 127 N. Y., 480.

Beal vs. Chase, 31 Mich., 490.
Hubbard vs. Miller, 27 Mich., 15.
National Ben. Co. vs. Union Hospital Co., 45 Minn., 272.
Whitney vs. Slayton, 40 Me., 224.
Pierce vs. Fuller, 8 Mass., 222.
Richards vs. Seating Co., 87 Wis., 503.
National Enameling & Co. vs. Haveman, 120 Fed., 415.
United States vs. Addyston P. & S. Co., 29 C. C. A., 141; 85 Fed., 271.
Davis vs. Booth, 131 Fed., 31, 37; also 127 Fed., 871.
In re Greene, 52 Fed., 104.
Chicago, St. L., etc., Ry. Co. vs. Pullman, etc., 139 U. S., 79.

The Circuit Court of Appeals for the Sixth Circuit in the case of *S. Jarvis, et al. vs. Knapp*, 121 Fed., 39, state the rule as follows:

"The underlying principle upon which the modern cases upon this subject are grounded, is, that one cannot stifle competition by a bargain having that purpose only, yet, one who purchases something or acquires some right, the value of which may be affected by the subsequent conduct of the seller, the purchaser may lawfully obtain a stipulation from the seller that he will refrain from such conduct. In the present case the stipulation would increase the value of the benefit purchased by the corporation, and it was associated with that contract in its essence and in its purpose."

In the case of *Davis vs. Booth*, 131 Fed., 37, the Circuit Court of Appeals of the Sixth Circuit, say:

"There is a clear distinction which seems to be lost sight of in the argument here, between the aggregation

of property by purchase, when the seller no longer retains an interest in the property, and a combination of the owners of property under one management, where each owner's interest is continued in the combination. To this latter class belongs the case of the *Merz Capsule Company vs. United States Capsule Company*, (C. C. A.) 67 Fed., 414, affirmed in 71 Fed., 787. It may be that the practice of acquiring by a single corporation through purchase, of a great number of plants in several states, and of power to control the market of a given commodity in a wide area of territory, may become injurious to the public; but, if so, it would seem that the limitation and the means for correction and restriction required, must be supplied by the lawmaking power, since the old law against forestalling the market has become obsolete."

In this case, under the title of *Booth, et al. vs. Davis*, 127 Fed., 871, the Circuit Court gives a full statement of the facts which shows a striking similarity to the case at bar.

The court held that a covenant by the stockholders of a corporation, which sold its property, business and good will, that in consideration of such sale, and as an inducement thereto they would not directly or indirectly engage in the same or like kind of business as that carried on by the company in the same territory, or in the immediate vicinity of such territory for ten years after the sale, rests upon a good consideration, and is lawful, and the right of the purchaser to enforce it will not be affected by the question whether he has conducted the business lawfully since his purchase.

In the case just cited the contract under consideration, had the following stipulation:

"That in making said transfer and as an inducement to said William Vernon Boothe to purchase said plant, business and good will, and pay the sum aforesaid for the same, we have each agreed that we would not, and we now do agree each for himself jointly and severally with him, the said William Vernon Boothe, his heirs and assigns forever, that we will not during the next ten years, in the territory or the immediate vicinity of the territory, dealt in by our company, or operated in by ourselves, or the agents or employes of the company, engage or in any manner be interested in either directly or indirectly, for ourselves or for others, the same or like kind or character of business as that heretofore conducted and now being carried on by said company, and that we will not during the said period of ten years, either directly or indirectly be guilty of any act interfering with the business, its good will, its trade or its customers, or come in competition with the same, and we will not jointly or severally either in firms or corporations, or as individuals, or in any other way directly or indirectly interfere with the said trade or business, or do any act prejudicial to the same or any part thereof, or interfere with the persons employed therein; the meaning hereof being, that the said William Vernon Boothe is buying and paying for the good will of the business in the largest and fullest scope of the term; and that we will not, and each agrees that he will not do anything to interfere with or injure the said business, but will during said period lend his aid and best influence to the promotion and advancement of the same."

The defense was, first, that the contract was against public policy, and in restraint of trade; that it was void under the provisions of the Sherman Act, so called, and an act of the legislature of the State of Michigan, entitled: "An Act to prevent trusts, monopolies and combinations of capital, skill and art, and carrying out restraints in trade and commerce."

The court said:

"The transaction by which the complainant acquired the title and interest for which it seeks protection in this cause was an out and out purchase of the vendor corporations property and good will, and of the ancillary agreement of its stockholders, the breach of which agreement is the gravamen of the complainant's case. That such a transaction is lawful seems clear.

"In *United States vs. Addyston Pipe & Steel Co.*, 85 Fed., 271, 29 C. C. A., 141, 46 L. R. A., 122, Judge Taft considers the question here involved, and in a forcible opinion demonstrates that agreements by the seller of property or business not to compete with the buyer in such a way as to impair the business sold are perfectly valid. The opinion has so carefully and fully reviewed the authorities in support of this proposition as to exhaust the subject. The judgment of the Court of Appeals (except in a minor part having no concern with the main question) was affirmed by the Supreme Court of the United States. 175 U. S., 211."

The court further said:

"It is therefore a matter of no concern whether or not the complainant is conducting its business in such a way as to reduce the cost of its commodity, and to increase its profits in that way, or by raising the price otherwise. The contract of purchase which is made with the Davis Fresh & Salt Fish Co., and its agreement with the defendant Davis and the other stockholders, by which they engage not to compete, individually or otherwise, directly or indirectly, with the complainant, was a contract wholly collateral to the scheme and method of its business and its rights and equities under the contract of sale; and the agreement with Davis and the other stockholders can be enforced with as much propriety as any other lawful contract or agreement into which it might enter."

Atlanta vs. Chattanooga F. & P. Works, 127 Fed. Rep., 23.

Further on the court said:

"Examining this agreement between complainant and Davis, it will be found that it has no feature which the law condemns. It is limited, as to time, for the ten years ensuing its date; 'and to the territory or immediate vicinity of the territory dealt in by the company, or operated in by ourselves or the agents or employes of the company.' Its validity is fully sanctioned by the case of the *Oregon Steamship Navigation Co. vs. Winsor*, 20 Wall., 67; 22 L. Ed., 315."

In the case of *National Enameling & Stamping Co. vs. Haveman*, 120 Fed. Rep., 415, the court held that a restrictive covenant made by one capable of contracting, which is unlimited as to time, and in area covers the entire United States, is ancillary to the main lawful contract (being in part consideration of the payment of good will sold), and is reasonable, and no broader than is necessary to save to the covenantee the rights and privileges for which he has paid, and may be enforced.

In *Gibbs vs. Gas Co.*, 130 U. S., 396, 32 L. Ed., 979, decided in 1888, although the case turned upon other points, Mr. Chief Justice Fuller, speaking for the court, referred to the question of contracts in restraint of trade. He says, that the rule laid down in *Match Co. vs. Reynolds*, 1 P. Wms., 181, was made under a different condition of affairs and state of society than that which existed at the time of the opinion, and had been then even considerably modified.

"Public welfare is first considered, and if it be not involved and the restraint upon one part is not greater

than protection upon the part of one party requires, the contract may be sustained."

Carter vs. Alling, 43 Fed., 208, was decided by Judge Blodgett in 1890. Plaintiff had an ink and mucilage business, extending throughout the United States and Canada, and the defendant, their employe, agreed not to work for any competitor for three years after leaving the employ of the plaintiff. The contract was held valid. Several of the expressed views of the judge are enlightening, to say the least of him. Here are two quotations:

"In later years, a further relaxation of the old rule has grown up both in England and America, and the courts have repeatedly recognized the validity of contracts in restraint of trade throughout the entire state or country when such restraint was not unreasonable, in view of the nature and extent of the business of the covenantee."

"The modern agencies of commerce have enlarged the field for the manufacturer and salesman to, or even beyond, the limit of the continent; and to whatever extent a manufacturer or dealer has by his energy or enterprise made a market for his wares, to that extent he has the right to protect his business from piratical competition by contracts like the one under consideration."

In *Harrison vs. Refining Co.*, 116 Fed. Rep., 304, the opinion by Circuit Judge Jenkins indicates a disposition to take a view somewhat similar to that adopted in the above cases, although the same issues were not therein involved.

The New York Court of Appeals, in the case of

Diamond Match Co. vs. Roeber, 106 N. Y., 473, 13 N. E., 419, the court canvassed the general question of contracts in restraint of trade with much care and ability, and this is considered a leading case on the subject.

In that case a covenant between the seller and purchaser of a business that the former would not within the United States, except in Nevada and Montana, engage in like business for a period of ninety-nine years, was held valid.

The Supreme Court of the United States, in the case of the *United States vs. The Joint Traffic Association, supra*, in discussing the principle contended for by the appellants in this case, say:

"We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufactory, restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the act, and it was said that such a contract was collateral to the main contract of sale, and was entered into for the purpose of enhancing the price at which the vendor sells his business."

The decisions sustaining contracts in restraint of trade which cover particular cities or towns or small localities are almost innumerable. Such contracts are usually made in connection with the sale of some business, industry or practice. Among the decisions are the following:

Peltz, et al. vs. Eichele, 62 Mo., 171.
Washburn vs. Desch, 68 Wis., 436.
Ellis, et al. vs. Jones, 56 Ga., 504.
Grundy vs. Edwards, 30 Ky., 368.
Johnson vs. Gwinn, 100 Ind., 466.
Dean vs. Anderson, 102 Mass., 480.
Hursen vs. Gavin, 162 Ill., 377.
Eddy on Combinations, Secs. 762, 789.

In the case of the *State vs. Shippers' Compress & Warehouse Company*, 95 Texas, 603, 69 S. W., 58, the Supreme Court of Texas, discussing the policy of the Andersons in acquiring a number of compresses in the northern part of the state of Texas, and applying the principles to a state of facts similar to those involved in this case, say:

"In determining the question of intention, we must consider as true every fact which can be fairly inferred from the evidence; and we are of opinion that the acquisition on the same day of six compresses, situated in localities distant from each other, will support the inference that the purpose of the promoters in organizing the corporation was to acquire these properties; and if the facts show that in doing so they violated the law, then we are of opinion the evidence will justify the conclusion that their intention in forming the corporation was to accomplish the unlawful purpose. It was not unlawful for the corporation to buy all of the properties that it acquired, nor was it unlawful for them to acquire all of them at the same time; and we see nothing in that fact which tends to show that the object at the time of organizing the corporation was to do a lawful act to effect an unlawful purpose."

In the same case the Court of Civil Appeals of the State of Texas use the following language:

"The mere fact that an individual or a number of individuals lawfully associated together in business may, by purchase which is permitted by law, acquire title to much of the property in a community, which may produce a certain commodity, or which may be used in converting commodities into articles of commerce, does not necessarily create a monopoly. There is no restriction imposed upon the limit of a man's purchases, provided it is not done to accomplish an illegal purpose. One may, if financially able, acquire much or all of the property of a given class, provided the purchase was not made for the purpose of injuring or accomplishing harmful results to the public; and from a bare exercise of this privilege it cannot be inferred that the purpose and intention were to create a monopoly or that a monopoly necessarily results from such extensive acquisition."

State vs. Shippers' Compress & Warehouse Company, 67 S. W., 1049.

The record in this case discloses that in the territory immediately around Oklahoma City and Shawnee at the time of the trial of this case there were in operation the following compresses: Sapulpa, Muskogee, South McAlester, Hugo, Ada, Shawnee, Ardmore, Pauls Valley, El Reno, Chickasha, Snyder and Hobart, a total of thirteen, out of which the Gulf Compress Company was operating three. (See printed record, page 80.) The record does not disclose that even this number embraces all of the compresses operated in the two territories, which in fact it does not. The question upon which the Supreme Court of Oklahoma reversed this case was not the real question presented and contested in the trial court, and the record therefore does not show the entire num-

ber of compresses within the boundaries of these two territories.

The record discloses that the Gulf Compress Company has not acquired this property for the purpose of obtaining a monopoly of the compress business, but, as stated by the president of the company, acquired only desirable property as an investment. (Printed record, page 61.) In the territory soon to be embraced within the State of Oklahoma, the Gulf Compress Company has control of three compresses, and the record shows thirteen are being operated in the proposed state; in Little Rock, in the state of Arkansas, the Gulf Compress Company owns one press out of five in that city, and owning but the one compress in the state of Arkansas. It owns or operates twenty-three compresses located at various points in the states of Alabama, Mississippi, Tennessee and Louisiana, or twenty-seven in all. There are two compresses at Greenville, Mississippi, one of which is owned by the Gulf Compress Company, and the other by a competing company; there are two compresses at Dyalsburg, Tennessee, one of which is owned by the Gulf Compress Company, and the other owned by a competing company. (See printed record, page 57.)

The Gulf Compress Company with twenty-seven compresses, six of which are located in the city of Memphis, and remainder scattered over the cotton growing states, certainly does not control any considerable proportion of the cotton compression business of the United States. This case not being presented in the trial court upon the theory upon which it was decided in the Su-

preme Court of the territory, this feature of the case was not developed in the evidence as thoroughly as it would have been had the case been tried on that theory, and while the record shows that the Gulf Compress Company controlled and operated less than one-fourth of the cotton compresses in the proposed state of Oklahoma, had inquiry been prosecuted at the trial as to the number of compresses in the state, it would have developed that the Gulf Compress Company really controlled a very small portion of this business, as there are of course a great number of compresses located in the proposed state of Oklahoma, which are not mentioned in the record, but only those supposed to be competitors of the Shawnee Compress Company were mentioned. We do not believe that from the record in this case it can be fairly said that the Gulf Compress Company has ever had any monopolistic tendencies or that its object has ever been the monopolizing of the compress business.

The Territorial Supreme Court complains that the contract having a provision in it inhibiting the Shawnee Compress Company from engaging in business within fifty miles of Shawnee makes it a contract restricting competition.

The statutes of Oklahoma expressly authorize a contract of this character. Sections 819 and 820 of Wilson's Revised and Annotated Statutes of Oklahoma read as follows:

"Sec. 819. Every contract by which one is restrained from exercising a lawful profession, trade, or

business of any kind, otherwise than as provided in the next two sections, is to that extent void.

"Sec. 820. One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified city, county, or part thereof, so long as the buyer or any person deriving title to the good will from him carries on a like business therein."

Both of these statutes were adopted from the statutes of California and have been frequently construed by the Supreme Court of that state.

Brown vs. Kling, 101 Cal., 295, 35 Pac., 995.
Gregory vs. Spejker, 110 Cal., 150, 42 Pac. 576.
Ragsdale vs. Nagle, 106 Cal., 332, 39 Pac. 628.
City Carpet Beating, etc., Works vs. Jones, 102 Cal., 506, 36 Pac., 841.
Vulcan Powder Company vs. Hercules Powder Company, 96 Cal., 510, 31 Pac., 581.

Under these sections of the statute one who leases a compress and its good will may enter into a contract to refrain from carrying on a similar business within a specified county. The contract of lease in controversy limits such competition to fifty miles. The evidence did not disclose whether a radius of fifty miles would have carried it without the boundaries of the county or not, but if fifty miles was an excessive restriction, the excess only was invalid and the restriction might be enforced within the limits of the law.

Such a contract being valid could not serve as a basis for concluding that it would be against public policy by creating an unnecessary restraint of trade, preventing competition and creating a monopoly.

We believe the proper rule is enforcement of the contract against competition within the limits of the county under the provisions of the Oklahoma statute, but if this restriction is invalid, it will be eliminated by the court and the remainder of the contract will be enforced.

c.

Justice Pancoast, speaking for the court, also says at page 221 of the printed record:

"Nowhere by the terms of the contract we are construing is the Gulf Compress Company obligated to continue the Shawnee plant in operation as an active factor in the cotton compress business. Its machinery might lie idle, its industry cease, for all the contract obligates them to the contrary."

Justice Pancoast evidently overlooked paragraph 10 of the lease contract found on page 20 of the printed record, which reads as follows:

"It is expressly stipulated that the landlord will do all that it reasonably can to make the operation of the compress in the hands of the tenants a success; that the enterprise shall be managed on sound business principles and in such manner as will tend to cooperate with the shippers, merchants and others at interest in building up and maintaining the cotton markets at Shawnee. The landlord agrees and pledges the tenant its good will, moral and real support, and that it, individually and collectively, will render the tenant any assistance in discouraging unreasonable and unnecessary competition, the purpose of both landlord and tenant being to increase the business of the compress at Shawnee as well as that of the planting and commercial community. *The tenant further agrees to in nowise use its other compresses to the detriment of the Shawnee compress or the Shawnee cotton market during the term of this lease.*"

A fair construction of this provision of the contract of lease, we believe, answers the whole objection found by the Supreme Court of the Territory of Oklahoma to the terms of the lease. The tenant, the Gulf Compress Company, agreed that it would manage the enterprise on sound business principles, and in such manner as would tend to co-operate with the shippers, merchants and others at interest in building up and maintaining a cotton market at Shawnee, and that it would in no way use its other compresses to the detriment of the Shawnee Compress Company or the Shawnee cotton market during the term of the lease. A fair construction of these provisions mean that it would, during the term of its lease, operate the compress at Shawnee on sound business principles, and that it would not use any of its other compresses to the detriment of the Shawnee compress, and answers the argument of Justice Pancoast that

"Nowhere by the terms of the contract we are construing is the Gulf Compress Company obligated to continue the Shawnee plant in operation as an active factor in the cotton compress business."

And answers the argument that

"The Gulf Compress Company might establish a compress at any competitive point it pleases and thereby wholly extinguish competition through these companies bound by its leases."

The court below overlooked a well recognized principle which would control in any event in the disposition of this case. If the Gulf Compress Company itself was

a monopoly, the Shawnee Compress Company could not for that reason prevent the specific performance of a contract for sale or lease, and, *a priori*, the minority stockholders could not interpose to prevent such performance.

Trenton Pottery Co. vs. Olyphant, 51 N. J. E., 507, 43 Atl., 723.
Diamond Match Co. vs. Roeber, 106 N. Y., 473, 13 N. E., 419.
Metcalf vs. American School Furniture Co., 122 Fed., 115-120.
Connolly vs. Union Sewer Pipe Co., 184 U. S., 547, 22 S. C. R., 431.
Willoughby vs. Chicago Junction Ry. Co., 50 N. J., 656, 25 Atl., 277.

In the case of the *Trenton Potteries Company vs. Olyphant, supra*, at page 729 of the 43d Atlantic Reporter the court say:

"A person engaged in any manufacture or trade, having the right to acquire and possess property, and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. * * * If his capital was large enough to permit him to buy the business of all competitors the last purchase would completely exclude competition, at least, for a time. But in the absence of legislative restrictions, if same could be imposed, upon the acquisition of such property, and its use when so acquired, courts could impose no limitations. They would be obliged to enforce such contracts, notwithstanding the effect was to diminish or even exclude competition. But the appellant is a corporation and not an individual. Corporations, however, may lawfully do any acts within the corporate powers."

SECOND.

The Supreme Court of Oklahoma should have denied the Andersons relief because they came into equity with unclean hands.

Practically the whole of the capital stock of the Shawnee Compress Company was owned by W. H. Beatty, T. F. Stubbs, Anderson, Clayton & Company, Neil P. Anderson & Company and John E. Portis, all of whom were cotton buyers. (Printed record, page 115.) Beatty and Stubbs, the owners of the majority of the stock, had operated the plant the preceding year at a loss of $2,042.53. (See printed record, page 199.) The operation by these cotton buyers of this plant and the compression of their own cotton gave to such shippers an advantage over competitive buyers and conflicted with section 3 of the provisions of the Interstate Commerce law. In the effort made by the Gulf Compress Company to lease the property this matter was fully presented. The Andersons, who were interested in twenty other compresses, were insisting on retaining possession of this compress, so that they might continue to enjoy the illegal advantage resulting to them from compressing their own cotton at their own plants. This design on their part was illegal and a court of equity would not interfere to advance such claims.

The Interstate Commerce Commission, in the case of the *Muskogee Commercial Club, et al. vs. Mo., Kan. & Tex. Ry. Co.*, 12 I. C. C. Rep., 356 decided in July, 1907, had under consideration the plan and policy adopted by the Gulf Compress Company, and its leasing of plants,

and the propriety of cotton buyers operating compresses, and among other things, Commissioner Lane says:

"The compress at Muskogee is operated by a professional compressor. It does not buy, sell, or deal in cotton in any manner, directly or indirectly; it receives 'flat' cotton from the railroad company, receipts for it, insures it, compresses it and loads it—all services for the carrier and for which the carrier pays. There are no charges to the shipper. No shipper, it is clear, can secure any favor or advantage over any other shippers through this compress, since it knows no shipper in the transaction. On the other hand, the compress at South McAlester is owned and controlled by the Lesser-Goldman Cotton Company, one of the heaviest cotton buyers and shippers in the territory. Through this compress it handles its own cotton and that of other buyers.

"The charge for compression—in the Indian Territory, 10 cents a hundred, or about 50 cents a bale—is paid by the carrier to the compressor out of the freight rate collected by the carrier from the shipper.

"If then the compressor to whom this 10 cents a hundred is paid is also a shipper, the transaction amounts to a return to the shipper of that amount. So much of the ten cents as is not expended in operating the compress is clearly gained to the compressor shipper over every other shipper. The freight rate paid to the compressor shipper is thus 10 cents a hundred less than the rate paid by the shipper, who does not own a compress, and to whom this amount is not returned.

"His net advantage is such part of the 10 cents as he does not expend in the operation of the compress; in other words, the profit in compression. This profit it is not easy to judge from the record, but it is estimated by witnesses at from 15 to 20 cents a bale.

"In addition to this, the buyer who operates a compress has the advantage, if he chooses to use it, of an

intimate knowledge of the buying, selling and shipping arrangements of every other cotton buyer whose cotton passes through his press; he knows where the cotton is bought and where it is to be sold, and the opportunity is thus open to him to compete most effectively at both ends of the market.

"He has also practical control over the movements of his competitors' cotton. If the compress is congested, and some cotton must be delayed in compression, he can put his own through and hold that of his rival. If cars are scarce and all the cotton cannot be shipped, he can ship his own and leave that of the other buyer standing on the platform. In short, the railroad company which accepts goods for transportation can so deal with those goods as to place one shipper under a business disadvantage with relation to his rivals. This is not an ideal condition of things, and sooner or later a way must be found by which carriers will be denied opportunity to pursue any such practices.

"The railroads must, if they wish this cotton compressed, for their own convenience, either go into the business of compressing for themselves, or give such work to those who have no interest whatever in the buying or selling of cotton."

Under this decision the railroads must contract for compressing with independent concerns, such as the Gulf Compress Company, or they must go into business as they have done in organizing the Atlantic Compress Company, and must refrain from having their compressing done at plants owned by the shippers or be subject to heavy penalties for rebating.

Under the decision of the Supreme Court of the Territory in this case, the two companies, because of their plan and organization, their methods of doing business,

the objects sought to be attained, are declared illegal, and it is ordered that this plant shall be placed under the control of the cotton buyers, while the Interstate Commerce Commission approves the plan, methods and objects of both companies. We submit that the Interstate Commerce Commission is right and the Supreme Court of the Territory is wrong in the premises it accepted and the conclusions it deduced. The Andersons' motives in desiring to obtain possession of the plant, even by legal process, being contrary to the policy and the regulations of interstate commerce, cannot receive any support in a court of equity. Their motives were constructively fraudulent, because the ends which they seek would be contrary to the provisions and policy of the law.

Not only, however, is their conduct reprehensible because the ends sought are prohibited by section 3 of the act to regulate interstate commerce, but also because they sought by wrongful means to force the sale of the Shawnee property to themselves at a sacrifice.

They were large stockholders in the Traders' Compress Company and the Shippers' Compress & Warehouse Company. In twenty of the compresses owned and maintained by these companies B. L. Anderson, for Anderson, Clayton & Company, had the active control. (See printed record, page 139.)

An examination of the evidence will disclose that the Andersons acted in bad faith in their dealings with the Shawnee Compress Company. The Andersons were fully advised of the financial exigencies of the company. Its creditors had caused notes that had matured to be

presented to them, and upon their non-payment had protested the same. On the 25th of January, 1905, B. L. Anderson wrote to F. E. Anderson advising him that one of the serial notes aggregating $18,000.00, with interest, long past due, executed by the Shawnee Compress Company to the Webb Press Company, Limited, had been presented to him for payment and protested. (See printed record, page 199.) They had also attended the meetings of the Shawnee Compress Company's directors and stockholders and knew and were fully advised of the dire straits in which the company was situated and the urgent necessity of in some way raising moneys to meet its matured obligations. It was their duty as stockholders and directors to have come to the assistance of the Shawnee company and to have, if possible, tided it over its temporary embarrassments. The evidence shows that they, with resources to help, with capital anxious to invest, pressed their offer to buy, threatened the company with competition, and sent telegrams discouraging and threatening others who were investigating the situation. (See printed record, pages 130 and 132.) The evidence shows that when the mortgage indebtedness, amounting to nearly the available assets of the corporation, was matured and pressing, its interest unpaid, checks were being protested, earnings garnisheed, laborers demanding their weekly pay, the property advertised for taxes, that they sat supinely by, with means to assist, content to offer but 14 cents for the stock, or $25,000.00 for the plant, but unwilling to do anything to help the company. (See Record printed, page 95.) Mr. Beatty asked in the stock-

holders' meeting if he (Anderson) would agree not to erect a press in Shawnee if the company would not make the lease, and Anderson answered that he would not (Record printed, pages 136, 137.)

The evidence shows and both of the lower courts found that at this time some effort was necessary to raise funds to meet the matured indebtedness. It was in this extremity that Beatty, as secretary of the Shawnee company, turned to the Gulf Compress Company for assistance, and the Gulf company offered to take up and pay the outstanding indebtedness upon the condition the Shawnee company would execute the lease in controversy. The Andersons, in their testimony at page 160 of the printed record, excuse their indifference to the welfare of the Shawnee company by stating that they were not asked to assist the company or to make any suggestions as to where assistance could be obtained, though they were present and participated in the meetings of the stockholders where several propositions were being considered to raise funds to meet current expenses. They admit also, that they were anxious to purchase the plant.

Their unfairness is emphasized by the evidence of Mr. Hanson on page 131 of the printed record, where Anderson requested Mr. Hanson to withdraw his lease offer, and after referring to conversations had with the Andersons in Memphis, in which Mr. Anderson stated that he was at a previous time about to close for the Oklahoma City Compress and Hanson came in and offered more than the plant was worth and got it, and after referring to the conversation had between the witness and

Anderson in Texas, in which Anderson stated that he had a man in Shawnee adjusting the affairs, he testifies that Anderson used the following language:

"This is our territory and you ought to keep out of it."

And that he had undertaken to get control of the Shawnee property and had "had a man in Shawnee trying to get the compress off and on for the past thirty days."

On the same date of this conversation, Mr. Hanson while *en route* from Memphis to Shawnee received a telegram in care of the conductor of the westbound train, as follows: (See printed record, page 197.)

"There is a trick on at Shawnee. I will arrive there about 3:20 o'clock on the Choctaw. Please quietly meet train. If you lease Traders' Company will build immediately Shawnee and Oklahoma City.

"(Signed) B. L. Anderson."

And also after arriving at Shawnee, Mr. Hanson received another telegram (see printed record, page 196) which read as follows:

"I will reach Shawnee about 3:20 on Choctaw. Delay negotiations until then and meet train and I will give you some valuable information.

"(Signed) B. L. Anderson."

On the same date F. E. Anderson sent a telegram to C. J. Benson at Shawnee (see record, page 179) in which he stated:

"Missed train. Cannot agree to lease but if you do so over my veto think you should have clause in contract if property sold lease to be annulled."

The Andersons are deserving of special condemnation for their conduct at the stockholders' meeting held on the 23rd of April, 1905, at which time the stockholders were electing a board of directors. None of the stockholders present at the time were charter stockholders of the company and none of them were informed as to the number of directors that the corporation was required to have under the charter, except the Andersons. After discussing the question in their presence, Mr. Benson was directed to wire to the secretary of the territory and obtain this information. The telegram was sent and an answer was received, in which the Secretary of the Territory stated that the articles of incorporation called for three directors. This was an error. The Andersons knew that it was an error. They also knew that the other stockholders believed it was correct, and in reliance thereon the stockholders proceeded to elect a board of directors of three members. At no time did the Andersons or either of them suggest to their colleagues and associates that five directors were required. This conduct of the Andersons viewed by an ordinary mind is capable of no other construction than that they were willing to oppress the corporation and the majority stockholders in any manner and to any extent; to coerce a sale of its plant or their holdings, and in case it resorted to any other measure to avoid such sacrifice, that they would be in po-

sition to insist that there had been no legal directory provided.

When a minority stockholder attempts to interfere with a majority in the management of the corporate property the rules of equity require that he shall not only be prompted by pure motives but that he shall have exhausted all means to have obtained a rescission of the wrongful acts by the board of directors or the majority stockholders.

Hawes vs. City of Oakland, 104 U. S., 450.

We cannot conceive how the Andersons can have any standing in a court of equity measured by this standard, because they not only failed to demand of the majority stockholders and the directors a change in their policy and plans of management, but remained silent at the meetings of those stockholders when they were discussing some plan by which moneys could be raised to meet expenses and when they were trying to elect a legal board of directors, with a knowledge of the legal requirements for such board, and failed to give any assistance in either of these matters. They knew that their associates were acting in the highest good faith in the election of the board of directors, and participated in the amendment of the by-laws changing the number of members of the board from nine to three without suggesting the invalidity of such by-laws.

The concealment of a fact by the statutes of Oklahoma is made an actual fraud. Wilson's Revised and Annotated Statutes, Sec. 743, Subdivision 3.

The rule which prevents the leasing of all of its property by a corporation also prevents the sale. The greater, of course, includes the less. The plaintiffs by attempting to coerce a sale to them were violating a principle which they claim was violated in the lease. The Supreme Court of New York say:

"In dealing with questions of this nature (an injunction against an unlawful act) the court should be studious to see that the rights of all parties are protected, and that the forms of law should not be permitted to be used on behalf of one party against another, when the party seeking the intervention of the court has been endeavoring to secure his ends by means similar to those which he seeks to enjoin on the part of his antagonist."

Sinsheimer vs. Union Garment Workers, 77 Hun, 215, 28 N. Y. S., 321.
McVey vs. Brendel, 144 Pa. St., 235, 27 Am. St. Rep., 625, 22 Atl., 912.
Dickinson vs. Consolidated Tr. Co., 114 Fed., 232, 240.
Richardson vs. Walton, 49 Fed., 888.
Brutsche vs. Bowers, 122 Iowa, 226, 97 N. W., 1076.

In *Richardson vs. Walton, supra*, page 894 of the 49th Federal, Circuit Judge Ackerson, discussing this proposition, says:

"But if a different conclusion on the facts were admissible, still in our judgment plaintiff would not be entitled to the relief he seeks for several reasons. In the first place, his secret purchase on his own account of competitive works, his unauthorized use of the notes of Walton, Wahn & Co., in effecting the purchase; his underhand arrangement with old and valued employes

of the firm, whereby their services were to be withdrawn from the firm and transferred to his rival establishment, and having acquired this advantage, his attempt to coerce his co-partners into selling their interests to him under threats of liquidation by legal proceedings—*were all acts so faithless and unfair to the defendants as to deprive plaintiff of any standing in a court of equity in this controversy.*"

If the plaintiffs' hands are unclean, they are also precluded from taking advantage of irregularities in the board of directors.

> *California Redwood Co. vs. Litle*, 79 Fed., 854, 857.

We submit that paragraphs 12, 13 and 14 of the answer found on pages 37, 38 and 39 of the printed record are supported by the proof, and that the appellees, plaintiffs in the courts below, having come into equity with unclean hands, are entitled to no relief.

THIRD.

In the sixth assignment of error argued herein, under the third subdivision, the Territorial Supreme Court is charged with erring because of its order reversing the judgment and directing the lower court to enter judgment for the plaintiffs in that court.

Counsel in the trial court conceded the real issue to be the question of *ultra vires* and the evidence offered on either side was directed to this issue. Incidentally the question of public policy was considered. It is apparent from an examination of the record that this question was

not presented fully to the trial court. As shown elsewhere in our brief there was no showing made of the number of compresses situated in the field occupied by the Gulf Compress Company. There was no attempt to show that only a very inconsiderable portion of the cotton growing territory was covered, and no effort to show that out of a crop aggregating 13,000,000 bales for the preceding year, the insignificant portion of which had been handled by the Gulf and the Atlantic Companies. We therefore insist that if the Supreme Court of the Territory regarded this question as controlling in the case, it became their duty to reverse the case and remand it for a new trial upon that issue.

"While it is impossible to lay down rigid rules regarding the power of appellate courts to remand cases, yet it may be stated as partly true that whenever it appears to be necessary for the purposes of justice the appellate court will remand for such further proceedings as the circumstances in the case may require."

18 Cyc., 453.
Wiggins Ferry Co. vs. Ohio & M. Ry. Co., 142 U. S., 396.

Two other questions were presented in the Supreme Court of Oklahoma by the plaintiffs therein, appellees herein, and on which they asked for a reversal of the decree rendered in this action.

The first question was, that the lease in controversy was beyond the scope of the chartered powers of the Shawnee Compress Company and was *ultra vires* and void, and the second was, that the lease was not executed

by parties authorized to represent the Shawnee Compress Company.

Believing that this Court would look to all questions raised, and if, in the judgment of this Court the judgment rendered by the Supreme Court of the Territory was proper, would affirm it, notwithstanding this Court might conclude that the contract of lease was not contrary to public policy; we anticipate these two propositions and desire to submit in support of the position of the appellants herein the following presentation of these questions.

Appellees urged in the Territorial Supreme Court that the case of *Thomas vs. Railroad Co.*, 101 U. S., 71, supports the proposition that a corporation cannot lease all of its property, thereby abandoning for a term of years its corporate business. We believe this is a misapplication of the principle laid down in *Thomas vs. Railroad Company, supra.*

The case of *Thomas vs. Railroad* was not a departure even at that time from the generally established law with reference to the sale of properties by public corporations, but was a confirmation of that principle, and in this decision the court declared a lease invalid, primarily for the reason that it was against public policy for a public or a *quasi* public corporation to sell or dispose of its entire property. It incidentally discussed the power of such corporation to sell independent of the right of eminent domain, but in all like cases in the Supreme Court of the United States, and in the Supreme Courts of the several states, this decision has been con-

strued as limiting the rights of *quasi* public corporations to sell or lease their property, as resting upon the assumption by such corporations of duties to the public in consideration of the grant to such corporations of the right of eminent domain and other privileges.

Mr. Justice Gray, in the case of *Davis vs. Old Colony Railroad*, 131 Mass., 258, 271, then a member of the Supreme Court of Massachusetts, in construing the case of *Thomas vs. Railroad Company*, stated that such principle rested not only upon the public nature of such corporations, but upon the further proposition that corporations could not alienate their property without legislative sanction or consent, but Mr. Justice Gray, afterwards, as a member of the Supreme Court of the United States, in the case of *The Central Transportation Company vs. Pullman Company*, 139 U. S., 24, reviews all the cases, and particularly the case of *Thomas vs. Railroad Company, supra*, and uses the following language:

"The plaintiff, therefore, was not an ordinary manufacturing corporation, such as might, like a partnership, or an individual engaged in manufactures, sell or lease all its property to another corporation."

He cites in support of this proposition the cases of *Ardesco Oil Company vs. North American Oil Company*, 66 Pa. St., 375, and *Treadwell vs. Manufacturing Co.*, 7 Gray, 393, and continues:

"But the purpose of its incorporation, as defined in its charter and recognized and confirmed by the legislature, being the transportation of passengers, the plain-

tiff exercised a public employment and was charged with the duty of accommodating the public in the line of that employment. * * * The plaintiff was not a strictly private but a *quasi* public corporation, and it must be so treated as regards the validity of any attempt on its part to absolve itself from the performance of those duties to the public."

Thus, the Supreme Court of the United States announced that the rules with reference to *quasi* public corporations and private corporations were different, and this distinction has been followed and applied in every adjudicated case within the last quarter of a century which we have been able to find.

Reese on Ultra Vires, in section 137, in discussing the case of *Thomas vs. Railroad Company*, states the principle as follows:

"This rule is based upon the theory that public or *quasi* public corporations which possess and exercise the right of eminent domain, or its equivalent, owe duties to the public as well as to their stockholders; and they cannot sell or lease their corporate powers and privileges, and thereby disable themselves from performing their public duties without legislative authority."

In the case of *Morriset vs. Howard*, 62 Kans., 463, 63 Pac., 756, the Supreme Court, in discussing the power of a private corporation to dispose of its assets, emphasize the distinction between a private and a *quasi* public corporation. It says:

"The mercantile company was organized for the purpose of buying and selling merchandise at retail, but

this does not preclude the company from disposing of its property and closing out its business, if it is done in good faith and not for the purpose of defrauding and delaying its creditors. Counsel cites a number of cases to the effect that a corporation cannot abdicate its corporate functions and absolve itself from carrying out the objects of its creation by a transfer of its entire property, or by otherwise disabling itself from performing its corporate duties. The doctrine of these cases is applicable to corporations established for *quasi* public purposes, such as railroads and other companies having the right of eminent domain and other extraordinary privileges, but it has no application to corporations of a strictly private character, like the one in question. The mercantile company exercises no powers of a public nature, and a sale of its property and the retirement from business do not contravene public policy or affect the public in any way."

All the cases cited by counsel for the appellees and relied on in the Territorial Supreme Court are cases applying to public or *quasi* public corporations, except the case of *Small vs. Minneapolis Electro Matrix Company*, 45 Minn., 264. But the Minnesota case has no application. The Supreme Court of Minnesota in this last cited case say:

"We need not inquire how far or under what circumstances, considerations of public policy and of general interests of the state may affect the right of a corporation to discontinue the business for which it was created, and to surrender to another corporation its property and the conduct of such business."

Such circumstances referred to in this quotation would be the existence of some exigency. No attempt was made in the Minnesota case to prove that the condi-

tion of the corporation demanded or required that such a lease should be made, but it was one of the many cases that may be found in the books where one corporation attempts to change its property for stock in another corporation. Such attempts have been universally enjoined in equity.

It is true that in many instances, and perhaps all, the courts require some exigency to exist which imperils the business, or threatens the property of the private corporation, before permission is given to lease its entire plant, but such exigency arises when the property of the corporation is threatened to be sacrificed by creditors, who hold matured indebtedness and insist upon payment.

The necessity of the corporation taking some action in the case at bar to raise money to pay the interest due on the first mortgage, to take up the second mortgage of the Shawnee National Bank, to pay salaries, and to settle taxes, is written in emphatic and indelible language upon every page of the evidence in this case, and such evidence was stamped with judicial sanction by the findings of the trial court and the Supreme Court of the Territory of Oklahoma.

Equity looks at the substance of things and not at mere names. Equity would therefore regard a lease for a period of five years not as a sale, but as a temporary suspension of the privileges and functions of the corporation.

There is a distinction between a temporary lease and a lease for a long period of time, or a sale of the prop-

erty. In the case at bar, the lease would run for a period of five years, at which time the corporation would be out of debt, with its property in repair, and such lease would not be equivalent to an abandonment of its duties and privileges as a corporation. This distinction should in equity be controlling in this case.

In the case of *Price vs. Holcomb*, 89 Iowa, 123, it was held that where the business of the corporation had been run at a loss and its works had been idle because the corporation was without necessary working capital, and because it was unable to secure it, and no practical plan for putting the works in operation had been agreed upon, though frequently discussed, and it was apparent that no agreement could be reached by which the works could be operated or leased, a sale should be made of the property and business of the corporation against the protest of the minority. In that case the minority stockholders, to escape the force of the sale, had made an indefinite offer to lease the property. The principle was sanctioned in this last cited case, that had the minority been able to obtain a definite and reasonable lease, which would have saved the company from the perils of a disastrous business, the court of equity would have perhaps prevented the sale and required the corporation to enter into the lease, but because of the indefiniteness of the said lease offer, the court permitted the sale. This case was cited and approved in the case of *Tracy vs. Lucas Prospecting Company*, 124 Iowa, 107.

The case of *Phillips vs. Providence Steam Engine*

Company, 21 R. I., 302, 43 Atl., 598, states the rule, in the syllabus, to be:

"Where a sale of a corporation's business is necessary, because no longer profitable, a private sale agreed to by the majority stockholders will not be enjoined in a suit by the minority stockholders."

While the question in this case was as to whether the sale should have been at public or private sale, the court very forcefully states the rule as follows:

"There is a difference of opinion as to the power of a corporation to sell its entire property and thus practically to retire from business. Some courts hold that it may be done by the consent of all the stockholders (7 Am. and Eng. Enc. of Law, page 734, note 1), and others hold that it may be done by a majority (*Id.* notes 2-4). All of the authorities cited in note 1, however, do not hold that the consent of all of the stockholders is necessary, e. g., *Treadwell vs. Manufacturing Co.*, 7 Gray, 393; *Wilson vs. Miers*, 100 E. C. L., 348, and others. But the editor adds: There seems to be no doubt that it may do so, when it is no longer able to profitably continue its business. We think that this is the correct rule. It has been recognized in this state, *Hodges v. Screw Co.*, 1 *R. I.* 312, 350. In *Wilson v. Proprietors*, 9 R. I., 590, Brayton, C. J., said: 'No case has been cited, and in view of the diligence of counsel in this case, we may say there is no case which holds that where the purpose of the incorporation could not be accomplished, and the business contemplated could not be carried on—where the capital has been exhausted in endeavors to go on, having no means to go further—a company thus laboring under burdens which they could no longer bear, could not release themselves by a surrender of their franchise to the state which granted and which was willing

to receive it, and that by a majority. This is not only for their benefit, but it is a necessity, and it would be hard, indeed, if one stockholder could, by his dissent, prevent such relief, against the prayer of all other members of the company."

In the case of *Plant v. Macon Oil & Ice Company*, 103 Ga., 666, the Supreme Court of Georgia have analyzed the principle involved in this case and say:

"Upon a cursory glance at the authorities above cited and a number of others we have investigated upon the subject, there would seem at first to be an irreconcilable conflict upon the powers and rights of a majority and the minority of stockholders in a private corporation, touching its authority to alienate or lease its property and franchises. But we think that nearly, if not quite all of the authorities upon the subject can be reconciled, and that from a careful consideration of all of them together, can be deduced the following principles, about which there seems to be very little, if any, conflict: 1st. While a public or a *quasi* public corporation cannot without express authority, convey or lease its property and privileges, as a general rule, this can be done by a private corporation. * * * 4th. A minority of stockholders cannot compel a corporation, against the wishes of a majority of the owners of stock therein, to continue a business that would be unprofitable or ruinous in its results to the interests of all concerned. * * * From these principles it follows as an inevitable conclusion that a private corporation has the right temporarily to lease or rent its property when the purpose of such action is not an abandonment of its franchises, but to meet an urgent necessity of raising a fund so as to enable it afterwards to conduct its business profitably, and to continue the enterprise for which it was created."

In support of the right of a private corporation to lease its property when an exigency demands it, we call the court's attention to the following cases which sustain the contention of the appellants, in addition to those heretofore cited and discussed:

Treadwell v. Salisbury Mfg. Co., 7 Gray 393.
1 Mor. Priv. Corp., Sec. 413.
Wood's Field's Corporations, Sec. 445.
Cook's Stocks, Sec. 667.
Price v. Holcomb, 89 Iowa 123, 56 N. W. 407.
Miners' Ditch Co. v. Zellerbach, 37 Cal. 543. 99 Am. Dec. 30.
Berry v. Broach, 65 Miss. 450, 4 So. 117.
Doyle v. Leitelt, 97 Mich. 298, 56 N. W. 553.
Skinner v. Smith, 134 N. Y. 240, 31 N. E. 911.
Freeman v. Seaview Hotel, 57 N. J. E., 67, 40 Atl. 218.
Tanner v. Lindell Ry. Co., 180 Mo. 1, 79 S. W. 155, 103 Am. St. Rep. 535.
State v. Western, etc., Co., 40 Kans., 96, 19 Pac., 349.
Levering v. Bimel, 146 Ind., 545, 45 N. E., 775.
Bartholomew v. Derby, 61 Am. St. Rep. 59, 69 Conn., 521, 38 Atl., 45.
1 Beach Corporations, sec. 580.
Hancock v. Holbrook, 9 Fed. 353.
Byrne v. Schuyler Elec. Mfg. Co., 65 Conn., 336, 31 Atl., 833.
Hodges v. Screw Co., 1 R. I., 347.
Wilson et al., v. Miers, et al., 100 Eng. Com. L., 348.
Warfield v. Marshall Co. Canning Co., 72 Iowa, 666, 34 N. W. 467.
Leathers v. Janney, 41 La. Ann., 1120, 6 So., 884.
Laumann v. Lebanon Valley R. R. Co., 30 Pa. St., 42.

Simpson v. Hotel Co., 8 House of Lords, 707.
26 Am. & Eng. Enc. of Law, 2nd Ed., 965.
10 Cyc., 1138.

In many cases this right to lease or sell in case of emergency is assumed as a matter of course even when relief is granted upon other grounds, such as fraud to the minority stockholder.

Byrne v. Schuyler Mfg. Co., 65 Conn., 339, 31 Atl., 833.
Sewell v. East Cape May Beach Co., 50 N. J. E., 717, 25 Atl., 929.
Rothwell v. Robinson, 44 Minn., 538, 47 N. W., 255.
Shaw v. Davis, 78 Md., 308, 28 Atl., 619.

The obvious and reasonable distinction between a lease for a short term and an absolute and final abandonment of the chartered undertaking by a sale is founded in wisdom. This court ought to give recognition and force to such distinction. An independent inquiry for the correct principle; a discriminating analysis of adjudicated cases; a determination to make the law sufficiently flexible to meet the varied demands of modern business and corporate usefulness; the intelligent pursuit of the substance rather than the shadow, support the right of a private corporation to escape by a short lease the continuance of a business temporarily unprofitable or an involuntary sacrifice of its property by forced sale. Law ought to furnish no exception to the general spirit of progress, but rather the highest and most advanced form of its manifestation. And where the necessities of pro-

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gressive business demand a course, the law should blaze a path.

The second proposition which will doubtless be presented and which we anticipate, is that the board of directors chosen at the meeting of April 24th, 1905, was illegal because the notice to the stockholders did not apprise them of the election of the board of directors and because the charter required a board of five directors when only three were chosen.

Counsel for the appellees contend that the trial court erred in not holding that the pretended proceedings attempted to be taken at the special stockholders' meeting of April 24th, 1905, are illegal and void; also in not holding and deciding that the pretended proceedings had at a subsequent special meeting of the board of directors are illegal and void.

It is important at the very outset of a discussion of these matters to bear in mind that the plaintiffs, appellees herein, Andersons, were present at all of the meetings in which any action was taken upon the matter of executing the lease in controversy. The appellees by attending and participating in a meeting waived the failure of the notice to apprise them of the purpose of the meeting.

Kenton Furnace, etc., Railway Co., vs. McAlpin, 5 Fed. 737.
Walworth v. Brackett, 98 Mass., 98.
Baintree, etc. v. Baintree, 146 Mass., 482, 16 N. E., 420.
Nelson v. Hubbard, 96 Ala., 238, 11 So., 433.
26 Am. & Eng. Enc. of Law (2nd Ed.), 989, and citations.

In the fourth subdivision of the *syllabi*, 5 Fed., *supra*, it is said:

"The notice of the meeting of the stockholders prescribed by the charter or by-laws of the corporation may be waived by the stockholders; and if each stockholder attends and participates in the action of the meeting, they are estopped from denying the legality of the notice."

All stockholders who did not attend, signed a written confirmation of the action of the stockholders and directors, and substantially ratified the same. (See printed record, pp. 180 and 181.) And as conclusive of this question, the stockholders at their meeting on May 1st, 1905, and the directors at their annual meeting on the same date, ratified and approved the leasing and the action of their officers in this matter. (See printed record, p. 206.)

Appellees, plaintiffs below, also contend that the charter requiring a board of directors composed of five members, the election of three was invalid, and that no action of the three so elected could bind the corporation, and also contend that the corporation can only act through its board of directors. But the trial court having found that the election was in good faith on the part of the majority, though under a misapprehension of the requirements of the charter caused by a telegram from the secretary of the territory, that such three members would be valid and legal members of the board of directors, and that they, constituting a quorum of the five, could act in all matters affecting the corporation.

The American and English Encyclopaedia of Law states the rule as follows:

"Where, at an election held for a certain number of directors, and a smaller number are elected, the election is valid as to them, and, if constituting a quorum, may act as a board."

21 Am. & Eng. Enc. of Law, 845.
Schmidt vs. Mitchell, 98 Ky., 218.
Gilchrist vs. Collopy, 82 S. W., 1018, 26 Law Rep., 1003.
2 Kent Com., 293.
Sargent vs. Webster, 13 Metcalf (Mass.), 497.
Ex parte Willcocks, et al, 7 Cow, (N. Y.), 402.
People ex rel. Cock, et al. vs. Fleming, 13 N. Y. S., 715; 59 Hun, 518.

In the case of *Sargent vs. Webster, supra*, the Supreme Court of Massachusetts say, in the third subdivision of the *syllabi*:

"A majority of the directors constitute a quorum, and a majority of the quorum have authority to decide any question upon which they can act."

The statute is clear that a majority of the directors constitutes a board, and when such board is in session, that a majority of such board may act.

An examination of *ex parte Willcocks, et al* and *People ex rel. Cock et al. vs. Fleming, supra*, will convince the court, from the force of their reasoning, that if an election is held for the election of a number of directors which is a majority of such board, such an election would

be valid in all cases, though at first, the earlier courts doubted whether the election of a less number than a quorum would be legal. But the rule is now generally accepted that the election of any number is valid, but that they cannot act for the corporation unless they constitute a quorum.

In the case of *Smith vs. Mitchell, supra*, it is stated:

"At an election of directors the full number was not elected, because of the ineligibility of the candidates voted for, the old board did not hold over, but those who were duly elected, constituted the governing body, with power to fill the vacancy."

In the New York case, *People vs. Fleming, supra*, the opinion is long and the argument is scattered, but an examination of it and the authorities cited, fully sustains our position.

In the case of *Vanderburg vs. Railroad Company*, 29 Hun, 348, it was held that any number of persons who might receive a majority of the lawful votes were elected, although there was a failure to elect the full board required by law.

In the *Matter of the Union Insurance Company*, 22 Hun. (N. Y.), 590, the Supreme Court of New York, upon full consideration of the question, in a well considered case, hold, that when a majority of a board is elected, it terminates the tenure of office of the old board, and such majority may act for the corporation.

People ex rel. Platner vs. Jones, 17 Wend., 81.
In re Excelsior Insurance Co., 38 Barb., 297.

Penobscot R. R. vs. Dunn, 39 Me., 587.
Wright vs. Commonwealth, 109 Pa. St., 561, 1 Atl., 794.

The Supreme Court of Pennsylvania in the case of *Wright vs. Commonwealth, supra*, sustain the contention of the appellants that the election of a less than a full board would be valid, and conclude with the following statement:

"I have been unable to find a single authority which sustains the position of the plaintiff in error."

In the case of *In re Excelsior Insurance Company*, 38 Barb. (N. Y.), 297, the court applied this rule under circumstances very similar to the case at bar. The Excelsior Insurance Company was incorporated under the general laws of the state of New York. Its charter provided:

"That the rights, powers and privileges now or hereafter conferred by law upon the company are vested in and shall be exercised by a board of directors consisting of forty persons."

A later act of the legislature authorized the reduction of the board of directors to twenty-one members. At an election held after the passage of this amending act only twenty-one directors were elected by the stockholders, it being assumed erroneously by the stockholders that the legislative act itself reduced the board to twenty-one. A petition was then filed for a new election

on the grounds that no action had been taken to reduce the board of directors as authorized by the amending act and therefore the election was wholly void. The Supreme Court refused the relief for the reason that the twenty-one persons so elected were legal directors, and that the failure to elect forty created a vacancy of only nineteen, and that the action of the stockholders in electing only twenty-one, by mistake, was regular, and said twenty-one constituted a quorum and were authorized to transact business for the corporation.

That a majority of a quorum of the board of directors may effectually bind the corporation, we believe under the law there can be no doubt. The concluding portion of section 957 of the 1893 Statutes of Oklahoma, section 969 of the Wilson's Annotated Statutes, provides:

"A majority of the directors is a sufficient number to form a board for the transaction of business, and every decision of the majority of the directors forming such board, made when duly assembled, is valid as a corporate act."

That is, a majority of the board constitutes a quorum, and every decision of the majority of such quorum is valid as a corporate act. The Supreme Court of California has passed upon this statute, and expressly held that a majority of a quorum may effectually bind the corporation.

Smith vs. Los Angeles Immigration Co., 78 Cal., 289, 20 Pac., 677, 12 Am. St. Rep., 53.

The Supreme Court of Iowa in the case of *Buell vs. Buckingham & Co.*, 16 Iowa, 284, in an interesting case, states the rule as follows:

"The majority of a quorum of the board of directors of a corporation at a meeting at which a quorum is present may bind the corporation."

This rule as stated in the Iowa case has been adopted in the following cases:

Wadhams vs. Litchfield, etc., Turnpike Co., 10 Conn., 416.
Adams vs. Hill, 16 Me., 215.
Damon vs. Granby, 2 Pick., 345.
Cahill vs. Kalamazoo Mutual Insurance Co., 2 Douglas (Mich.), 124, 43 Am. Dec., 453.
Foster vs. Mullanphy Planing Mill Co., 92 Mo., 79, 4 S. W., 260.
Keyser vs. Sunapee District No. 8., 35 N. H., 477.
Wells vs. Rahway White Rubber Co., 19 N. J. E., 402.
Booker vs. Young, 12 Gratt., 303.
Rex vs. Miller, 6 Tr. Reps., 268, 3 Revised Reports, 172.
Martin, et al. vs. Chute, (Minn.) 24 N. W., 353.

CONCLUSION.

In conclusion we believe that the Supreme Court of the Territory was in error in holding that the contract of lease was against public policy, and believe that the other errors assigned in the Supreme Court of the Ter-

ritory by counsel representing the appellees herein are untenable, and that the decision of the Supreme Court of the Territory ought to be vacated and reversed, and the judgment of the District Court of Pottawatomie County, Oklahoma, ought to be affirmed.

Respectfully submitted,

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B. B. BLAKENEY,

Attorneys for Appellants.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

THE SHAWNEE COMPRESS COMPANY, THE GULF COMPRESS COMPANY, T. F. STUBBS, et al.,
Appellants,

vs.

NEIL P. ANDERSON, B. L. ANDERSON, MORRIS E. BURNEY, co-partners as Neil P. Anderson & Company, and F. E. ANDERSON, M. D. ANDERSON and W. L. CLAYTON, co-partners as Anderson-Clayton & Co.,
Appellees.

No. 140.

REPLY BRIEF OF APPELLANTS.

B. B. BLAKENEY,
Of Counsel for Appellants.

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In our original brief we fully state the facts which we regarded as controlling in the disposition of the cause, and the appellees find but little objection to our statement. The facts were found by the trial court in favor of appellants and the Supreme Court of the territory reversed the decision of the trial court upon the one finding, that the contract of lease was contrary to public policy, and therefore invalid. The facts developed at the trial of the cause

are not in main contradictory, but the inference or conclusion to be deduced from admitted facts was the question of difficulty and division. The Territorial Supreme Court reached the conclusion that the trial court was in error in holding the contract valid under, what we term, the fourth objection urged to the lease in appellees' amended petition, and reversed the judgment with direction to enter judgment for the appellees because it concluded the contract was unlawful.

ARGUMENT.

Appellees in their amended petition and at the trial, presented four issues:

1. That the meeting at which the directors were elected was irregularly called, an insufficient number of directors was elected at a time when there were no vacancies in the board, and the action of such board in authorizing the execution of the lease was invalid.

2. That the Board of Directors, or a majority of the stockholders, under the charter of the Shawnee Company, had no power over the objections of the minority stockholders to sell, lease or otherwise dispose of the entire property of the corporation, even by a lease for the period of five years, whether or not the pressing indebtedness of the corporation threatened the forced sale and sacrifice of its property, but that the corporation must wind up its business and surrender its charter under the provisions of the law for the dissolution of corporations.

3. That the majority of stockholders and directors caused the lease to be executed to advance their personal interests, and not in the interest of the corporation.

4. That the Gulf Compress Company in its operation and method of conducting business is a trust, combination and conspiracy in restraint of trade in violation

of the Federal anti-trust laws and the anti-trust laws of Oklahoma, and that said lease was procured in furtherance of such unlawful contract, combination and conspiracy.

I.

It is true that the notice of the stockholders' meeting called for the 24th of April, 1905, did not disclose the business which would be performed at such meeting. A copy of such notice is found as Exhibit "A" attached to the plaintiff's petition (Record, page 14).

At the meeting held on April 24th, 1905, the stock of the appellees was represented (Exhibit "B," Record, page 14). On the books of this corporation this stock appears in the name of Neil P. Anderson & Co. as a partnership, and Anderson-Clayton & Co. as a partnership, and B. L. Anderson was one of the partners in the Neil P. Anderson & Co., and F. E. Anderson was one of the partners in the Anderson-Clayton & Co. (Record, pages 10 and 11). These parties attended the meeting, representing their respective partnerships, and participated in the business at that meeting. They did not act for their respective partnerships under proxies, but acted as members of their respective firms (Record, page 48). At this meeting three directors were elected, to-wit: F. E. Anderson, T. F. Stubbs and W. H. Beatty, and immediately after the adjournment of the stockholders' meeting this Board of Directors met and organized by electing T. F. Stubbs president, F. E. Anderson vice-president and W.

H. Beatty secretary and treasurer. On April 26th, 1905, a meeting of the Board of Directors was attempted to be held, which only Beatty and Stubbs attended, but on this day T. F. Stubbs as president and W. H. Beatty as secretary gave notice in writing to each of the directors that a meeting of the Board of Directors of the Shawnee Compress Company would be held on the 1st day of May, 1905 (Exhibit "E," Record, page 17). On the 1st day of May, 1905, at the time and place designated in the notice, and under the by-laws, the Board of Directors convened, there being present T. F. Stubbs, W. H. Beatty and F. E. Anderson, at which the minutes of the preceding meetings of April 24th and of April 26th, 1905, were read and approved by a majority vote, W. H. Beatty and T. F. Stubbs voting in the affirmative, and F. E. Anderson voting in the negative (Exhibit "H," Record, page 22). At this meeting a resolution was presented, authorizing the lease in controversy, and carried by a majority vote; W. H. Beatty and T. F. Stubbs voting for the same, and F. E. Anderson being present but not voting. These last minutes above referred to will be found on pages 22, 23 and 24 of the printed record.

This lease was specifically authorized by the stockholders at a meeting on April 24th, in which appellees participated (Record, page 15).

Counsels for appellees contend that these meetings were irregular. First, because the notice given of the same did not apprise the members of the nature and character of the business intended to be done at the meetings. Second, that the charter required five directors to be

elected, and the election of three would be invalid, and, third, that there were no vacancies in the Board of Directors, and any election was invalid.

We have shown in our original brief, on page 54, that the appellees, being present and participating in these meetings, waived failure of the notice to apprise them of the purpose of the meetings. Counsel for appellees, to escape this, contend that the partnerships were represented by proxies. The rule is that where stock is owned by and registered in the name of the partnership, it may be voted by any of the partners.

26th Am. & Eng. Enc. of Law, 1001.
Kenton Furn. R. & N. Co. vs. McAlpin, 5 Fed., 737.
Allen vs. Hill, 16 Cal., 113.

In *Kenton Fur. R. & N. Co. vs. McAlpin, supra*, in the 6th subdivision of the syllabus, it is said:

"One partner of a firm, which owns stock in a corporation as a part of its assets acquired in its regular business, has the power to represent that stock in all matters which relate to it in the usual management of such firm's business, and his action binds the firm; thus, he may receive and waive notice of stockholders' meetings, vote at such meetings, etc."

In the opinion in this last case, Swing, district judge, in charging the jury, at pages 747 and 748 of the 5th Fed., uses the following language:

"You will bear in mind that two of these subscriptions of stock stand in the name of companies—Damarin & Co. and Bell & Co., representing two portions of these

certificates of stock; and it is said by the plaintiff that the action of the meeting was invalid, even if it were lawful without the notice, for the reason that all of the parties owning stock, or to be affected by such action, were not present. It is not claimed by anybody that all of the members composing the firm of Damarin & Co. were at the meeting, nor is it claimed by anybody that all of the members composing the firm of R. Bell & Co. were at the meeting; and if the separate members of these two firms, in this transaction, are to be treated as separate and distinct owners of an aliquot part of the stock, which existed in their name, as a matter of course, the meeting would not be binding, because all the parties were not there to participate.

"This leads us to consider whether it was necessary for each one of the members composing these two firms to be there and participate in the deliberations of that meeting in order to make it binding upon the firms. It is admitted that one of the members of the firm of Damarin & Co. was at the meeting. It is a general proposition of law that the act of one partner in and about the business of a firm is binding upon each and every member of that firm, and it is another general proposition of law that notice to one of the partners in relation to matters which are connected with the business of the firm is notice to all of them. I say to you that one partner of a firm, which may own stock in a corporation as a part of the assets of the firm which they have acquired in the regular business of the firm, has the power to represent that stock in all matters which relate to the stock in the usual management of the business of the firm of which he is a member. About this proposition there can be no doubt, and it is wholly unnecessary for me to refer to authorities upon the question.

"And so with the question of notice. If notice is given to one of the partners of a firm of that which is to occur in relation to the business of the firm in its legitimate or ordinary business transactions, that is notice to

all the members of the firm, and they are bound by it. And so one member of the firm, if he has power to act in regard to the meetings of this corporation, and to act for his firm in the meetings, has the power to waive the necessity of the notice to the other members of the firm, and if he attends and takes part in the meetings of this corporation, and joins in the resolutions and acts of the corporation, the other members of the firm are estopped from denying that they had no individual notice of this meeting, or what was to be done at it."

It is conceded that the charter of the corporation required five directors, and only three were elected. At a previous meeting there had been nine directors elected by the stockholders of the Shawnee Company (Record, pages 116 and 117). They were J. M. Aydelotte, W. H. Beatty, C. J. Benson, A. E. Nelson, F. E. Anderson, J. E. Portis, T. F. Stubbs and H. T. Douglas. Only five of this board, of course, was valid and legal directors. Which five of the board is valid? J. M. Aydelotte was elected president and W. H. Beatty secretary, and under the laws of Oklahoma the president and secretary must be directors; therefore, the corporation would be estopped from denying that its president and secretary were not directors. The by-laws of this corporation provide (Sec. 8, page 200, of the Record), that the Board of Directors should select three of their own number as an executive committee, and the executive committee selected were W. H. Beatty, A. E. Nelson and F. E. Anderson. F. E. Anderson was also a member of this board, because he had been selected as vice-president of the corporation, and only a stockholder, under the statutes of Oklahoma,

can be a vice-president. H. T. Douglas was recognized by the directors and by the corporation as a director, and was elected treasurer of the corporation.

It also appears from the record that the executive committee acted as such committee during the years of 1904 and 1905. By fair construction it seems that the five legal directors then of this corporation were J. M. Aydelotte, its president; W. H. Beatty, its secretary; F. E. Anderson, its vice-president; H. T. Douglas, its treasurer, and A. E. Nelson, a member of its executive committee. If that be true, Beatty and Anderson were members of the board of directors, independent of the meeting held on April 24th, at which J. M. Aydelotte resigned as the president of the corporation, because he had ceased to be a stockholder in this corporation, and T. F. Stubbs was elected as a director and as president of the corporation. Then T. F. Stubbs, W. H. Beatty, H. T. Douglas, A. E. Nelson and F. E. Anderson would have continued as directors of this corporation. But it appears from the examination of the record that Nelson had assigned all of his stock to Stubbs and Beatty (Record, pages 97 and 128), and had ceased to be a stockholder in said corporation, and under the provisions of section 968, page 340, of the Revised and Annotated Statutes, 1903, of Oklahoma, A. E. Nelson could not be a director of this corporation. There was to that extent a vacancy in the Board of Directors. Who was the fifth member of this board? It could not have been either C. J. Benson or J. E. Portis. C. J. Benson was present and participated in the action of the stockholders in reducing

the Board of Directors to three, and voted for the election of the new directors, and would be concluded by so acting (see Record, page 15). J. E. Portis expressly consented to the reduction to three and to the validity of the election (Record, page 180).

However, if not so concluded, Benson refused after the election of the new board to longer act as a director of the corporation (see Record, bottom of page 145). Portis and Douglas filed a written waiver of the meeting and a confirmation of the action of the stockholders in electing a new Board of Directors, and their full consent to the same (see Exhibit "12," page 279). It is clear from this record, as found by the trial court, that the Board of Directors consisted, after the election of April 24th, of T. F. Stubbs, W. H. Beatty and F. E. Anderson, and that no other members of said corporation claimed to be or were recognized by the corporation as directors of the corporation.

Sec. 1 of the by-laws, page 200 of the Record, expressly provides that the management of the affairs of this corporation shall be vested in a Board of Directors, *who at all times shall be stockholders of the corporation;* thus when Aydelotte and Nelson ceased to hold stock, they forfeited their offices as directors, and there was a vacancy of these two members, and it is immaterial whether or not Douglas continued as a director of the corporation. The election of T. F. Stubbs as such director, and his recognition by the Board of Directors by electing him president of the corporation, would make

him a legal director, and with Beatty and Anderson would constitute the majority of the board.

We have shown in our original brief, commencing on page 55, that the majority of the directors, constituting a quorum, might act for and bind the corporation. It also appears from the evidence that Benson, whether or not a director, was selected with Beatty and Anderson as a committee to confer with the Gulf Compress Company, and was authorized to enter into the lease, and did attempt to execute such lease, and in all things fully ratified the act of the board of directors. (See record, page 23). In addition to this, the action of the board was approved at the annual meeting of the stockholders held on the 20th day of June, 1905. If the majority stockholders, in good faith, however, believed that the board under the law, should consist of only three directors, and attempted to elect a legal board, and the same was recognized by all the stockholders as a legal board, such three would be legal directors, and if a quorum, could bind the corporation. Anderson voted for the reduction of the number of directors and for the election of the three new directors. The reduction was carried unanimously. (Record, page 16). And this election was approved at the annual meeting. (Record page 93). (The reference on page 93 to meeting held on October 26th is a typographical error, meaning obviously, April 26th).

In the resolution itself reducing the board of directors from nine to three, (Record, page 15), it was stated, "That in order to comply with the charter and

articles of incorporation," that three members should be elected. In a telegram from Wm. Grimes, secretary of the territory, to C. J. Benson, (Record, page 183), it was stated that "the articles of incorporation Shawnee Compress Company call for three directors." Therefore, the stockholders acted in good faith in electing the three directors and such directors could bind the corporation as shown in our original brief, page 55.

It appears that the annual meeting of the stockholders held on the 6th of June was adjourned to June 20th. We offered in evidence the minutes of the stockholders' meeting held on June 6th, found in the corporation minute book on page 58, and the minutes of the meeting of June 20th found on page 60 of said book. (See Record, page 145). The minutes of the annual meeting held on June 6th are incorporated in the record on page 207, but the minutes of the adjourned meeting of June 20th are not in the record. We believe that it would be but fair to ask this court to presume in the absence of part of the evidence that there was sufficient evidence offered to justify the trial court in finding that the action of the directors was ratified and confirmed at the annual meeting in its adjourned session held on June 20, 1905.

II.

Appellees' second objection to the validity of the lease, was that by executing the lease of all of its property for the period of five years, the Shawnee Company

abandoned its chartered purposes, and that the lease was therefore invalid.

Counsels for appellees, in their brief in this court, have argued that the record discloses that the Shawnee Company was not indebted, that there was no necessity existing for the execution of the lease. The trial court found from the great mass of evidence offered that the financial condition of the Shawnee Company justified the execution of the lease, and this finding was expressly affirmed by the Supreme Court of the Territory in the first subdivision of the syllabus, and in the opinion found on page 219 of the record. It was proven beyond controversy that $6000.00 was owing to a local bank, secured by a second mortgage, and $11,000 was owing to the Webb Compress Company Ltd., secured by a first mortgage, on all the property of the company; that the company had no money; that its property had been offered for sale for taxes and employes had garnisheed the banks to recover their salaries. It is so patent that the company could not protect itself against the indebtedness to the local bank without the execution of the lease, that it seems unnecessary to enter into a discussion of the other facts in the case.

At the trial of the case the Andersons claimed that they were willing to advance moneys to take up the indebtedness of the company, but admitted that they had never made any proposition of that character at any of the meetings of the board of directors or stockholders when ways and means were being discussed, and it was so clearly an afterthought occurring to them at

the trial, that the court disregarded such claim and sustained the lease. When a private corporation is indebted and its property is threatened to be taken in satisfaction of such indebtedness, and the corporation is unable to protect itself, it may either sell its property entirely or enter into a lease for the purpose of procuring the means to meet its urgent demands. We believe that this is a universal rule in this country and in England. No case has been cited to the contrary.

Counsels for the appellees in their brief, on page 52, *et seq.*, contended that because an increase of the stock had been issued on the 10th day of June, 1901, to its stockholders, under the agreement that such new stock should be divided or apportioned pro rata among the stockholders according to the amount of stock held by each, without any consideration being paid for such additional stock, that the corporation could recover against such stockholders, their unpaid subscriptions, and thereby obtain moneys for the continuation of its business.

The assertion that no consideration was paid for the increase of stock is a mere presumption of counsels. But if admitted to be true, we do not see how that could affect the situation in which the company was on the 24th day of April, 1905. The only one of the stockholders to whom this stock had been issued without payment, if so issued, who was then a member of the company, was C. J. Benson, and if they could have recovered the $3500.00 against him for his thirty-five shares, it

would not have met the demands of the corporation. But there is another reason that seems to us conclusive upon this false premise, and that is, in April, 1905, any right of action against any of the stockholders to recover for stock which had been issued, but had not been paid for, was barred by the statutes of limitation. The corporation issued its stock showing that the same was fully paid up, and this stock came into the hands of the appellees and of Beatty and Stubbs with such recital on the face of the stock. (Record, page 122). The corporation would be concluded by the recital of the stock and be estopped against purchasers from asserting that the stock was not fully paid up. Counsels for appellees, after presenting with apparent seriousness this position, cite the case of *Parsons vs. Tacoma Smelting Co.*, 65 Pac., 795, 25 Washington, 492. The Washington case is entirely inapplicable because in that case, its appearing that the stockholders had only paid a portion of their subscriptions and were themselves indebted to the corporation, the court properly held that if the stockholders were required to pay up their stock, that the corporation would have sufficient funds to carry on its business. But it certainly cannot be seriously contended that the purchasers of the stock in the Shawnee Company could be required to pay an assessment on stock which on its face showed that it was non-assessable and fully paid up, because some prior owner had not fully paid the corporation the par value of same. And if so, like any other

obligation, not being in writing, would be barred at the expiration of three years under the Oklahoma statutes.

Rochester & K. F. Land Co. vs. Rover, 7 App. div. 366, 40 N. Y. Sup. 72.

We believe from the evidence that it is unfair to assume that because the stock was to be issued to the members that it was to be issued without their paying any consideration therefor, and the burden of proving such condition is certainly upon the appellees.

III.

Counsels for appellees insist that the contract of lease was void as to the non-assenting stockholders for the reason that same was not executed by the parties assuming to represent the Shawnee Company as its managing officers, for the best interests of the said company, but to advance their own personal interests.

The finding of the trial court is sustained by the preponderance of evidence, and we believe that this court would not reverse such finding, but if so, we call attention to the fact that the record does not contain all the evidence offered upon this question. The omission of the minutes of the annual meeting of stockholders is the omission of important evidence upon this question. If the stockholders at the annual meeting ratified and approved the lease in controversy, it would become binding upon the corporation whether its execution was regular or not.

IV.

The fourth objection presented in the amended petition of the appellees, and the one on which the judgment of the Supreme Court of the Territory is sought to be affirmed, is that the contract of lease is contrary to public policy and void. The appellees stated in their amended petition substantially this objection in the following language: (Page 31 of Record).

"That said Gulf Compress Company is in its operation and method of conducting business, a trust, combination and conspiracy in restraint of trade and commerce in violation of the federal anti-trust laws and the anti-trust laws of the Territory of Oklahoma."

It was not urged in this petition that any *provision of the lease* was in the *unreasonable* restraint of trade and invalid. The petition was therefore drafted upon the theory that the Gulf Compress Company was itself a combination of capital organized for the purpose of establishing a monopoly in the compressing of cotton, which was prohibited by the Act of Congress 26th Statutes at large, 209 Chap. 647, and by the anti-trust statutes of Oklahoma. Appellees did not in either of the lower courts, and have not in this court, contended that the anti-trust laws of Oklahoma affect this contract of lease, or that the Gulf Compress Company was a combination prohibited by the territorial laws.

The Supreme Court of the territory held that the Gulf Compress Company as conducted, was unlawful and against public policy, its operation tending to the

unreasonable restraint of trade, the prevention of competition and the establishment of a monopoly, and counsels for appellees, (page 15 of their brief), say, in effect, that the Supreme Court of Oklahoma Territory held that the contract of lease from the Shawnee Compress Company to the Gulf Compress Company tends to create a combination *unreasonable* in restraint of trade, etc. This is an admission that the contract of lease was assailed in the amended petition for one reason and held invalid in the Supreme Court of the territory for another.

A contract in restraint of trade is invalid for one of two reasons:

1. That it intervenes the provisions of the statutory law, as is claimed in this case, its provisions are prohibited by the Act of Congress of July 2, 1890.

2. That it is an unreasonable restraint of trade and prohibited by the course of the common law.

It is our contention that the Supreme Court of Oklahoma Territory did not intend to, and did not, hold the contract in controversy void, because it transgressed the provisions of the Sherman act. This is clear for five reasons:

1. No reference is made in the decision to the Sherman Act.

2. No reference is made in the decision to the many well considered decisions of this court construing this act.

3. That the invalidity of the contract is asserted because it is in *unreasonable* restraint of trade.

4. Because the contract is not affected by the Sherman Act.

5. Because the court applies the rule in the case of *Navigation Co. vs. Winsor*, 20 Wallace, 64-68, which was decided prior to the Sherman Act.

Of course this court will examine this question originally without reference to the decision of the Supreme Court of the territory, but a proper comprehension of the facts can best be acquired from an analysis of the decision below.

It seems improbable that the Territorial Court should have held not only that this contract was invalid, but by one blow have stricken down the business and destroyed the properties of two great industrial corporations because their business was prohibited by an act of Congress, and nowhere have referred to any terms of such act violated. It is equally improbable that it should have had in mind the Federal Anti-trust Act, and in an elaborate discussion of the circumstances surrounding such contract and the scope of the business of the Gulf Company, have nowhere referred to the many well considered cases construing this act by this Court. No question of modern times has demanded and received the attention of the court more difficult of solution, than the proper construction of the Act of Congress, 26 Stat. at Large 209, Chap. 647. The construction of sections one and three is necessarily the same. The first section applies to interstate trade and commerce, and the third

section being in the same language except that it applies to trade and commerce within the territories or District of Columbia. Therefore, the decisions of this court construing section one are controlling as to the construction of section three. The Territorial Court in disregarding this construction by this court in effect held that the Sherman Act as construed by this court could not be applied to the case at bar or the contract involved.

It is also clear that the Territorial Court did not apply the Sherman Act, because in the second and third sub-divisions of the syllabus the court in the holding provisions say:

2. "That such corporation, the Gulf Compress Company so conducted, is unlawful and against public policy, its operation tending to the *unreasonable* restraint of trade, the prevention of competition, and the establishment of a monopoly."

3. "That the execution of such lease will be perpetually enjoined, or if executed, the contract will be declared an *unreasonable* restrain of trade, and therefore void on the grounds of public policy."

Counsels for appellees concede in their brief, page 16, that the reasonableness of a contract does not make it valid under the Sherman Act, and thereby impliedly admit that the Supreme Court of Oklahoma by measuring it by the standard of reasonableness did not construe it with reference to the Sherman Act.

No question is better settled by this court than that a contract which *directly* intervenes the provision of the

Sherman Act is void without reference to it being reasonable or unreasonable. In the syllabus in the case, *United States vs. Freight Assn.*, 166 U. S., 240, the court says:

"The prohibitory provisions of the said act of July 2, 1890, apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation; and are not confined to those in which the *constraint is unreasonable.*" This principle was expressly affirmed in the Joint Traffic Association case, 171 U. S. 505, and in the Northern Securities case in 193 U. S. 197. Justice Harlan states in the syllabus and also in the opinion in the last cited case.

"That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable but embrace all direct restraint, reasonable or unreasonable."

Therefore it seems clear that by measuring the contract of lease in question by its reasonableness and denouncing it because found unreasonable, the Supreme Court of the Territory did not intend to test it by the act of July 2, 1890, known as the Sherman Act.

It is also clear that the lease contract is not affected by the Sherman Act and it is fair to assume that the Territorial Court so regarded it.

The lease in question had two clauses which the Territorial Court considered too restrictive.

Clause 6 (page 19, record): "The landlord shall not, during the term of this lease, without the consent of the tenant, directly or indirectly engage in the compression of cotton within fifty miles of any plant operated by the tenant."

And clause 10 (Record, page 20): "* * * The landlord agrees and pledges the tenant its good will, moral and real support, and that it, individually and collectively, will render the tenant every assistance in discouraging unreasonable and unnecessary competition."

Discussing these clauses, counsels for appellees on page 26 of brief say in substance that the Gulf Company would "very naturally term any and all competition therewith unreasonable and unnecessary." Now admitting this construction and this far-fetched inference, these terms obligate the Shawnee Company not to compete, during the life of the lease, with the Gulf Company within fifty miles of any plant operated by the Gulf Company and to assist in discouraging all other competition with the Shawnee plant. Even if this be the contract, is it affected by the Sherman Act? We think not. The primary purpose of this contract was the *leasing* to the Gulf Company the compress plant at Shawnee. The restrictive clauses were merely *ancillary*. The restriction was not the main direct purpose, but a collateral agreement. Such restrictive provision has always been regarded collateral to a contract of sale or leasing. A verbal agreement not to compete with the purchaser or lessee has uniformly been held not to vary the written contract of leasing or of sale because collateral.

Wely vs. Rhodins, 87 Ind., 1.

In *Wely vs. Rhodins*, the Supreme Court of Indiana had under consideration the question whether parol evidence would be received to establish an agreement to re-

tire from business when the contract of lease was in writing, and whether such verbal agreement varied in any respects the written contract. The court said: "The written lease seems to be as the parties intended to make; and the alleged parol agreement is so far separate that either may be enforced without effect upon the other. The parol agreement is *collateral* to the main agreement and does not vary it."

This court have always held this character of contracts valid.

Prior to Sherman Act:

Oregon Navigation Co. vs. Winsor, 20 Wall., 64.
Gibbs vs. Gas Co., 130 U. S., 396.
Fowle vs. Park, 131 U. S., 88.
Chicago, St. Louis Ry Co., vs. Pullman Co., 139 U. S., 79.

Under the Sherman Act:

United States vs. Trans-Missouri Ft. Assn., 166 U. S., 290.
United States vs. Joint Traffic Assn., 171 U. S., 505.
Bement & Sons vs. National Harrow Co., 186 U. S., 70.
Northern Securities Co. vs. U. S., 193 U. S., 197.
Cin. P. B. S. & P. P. Co. vs. Bay, 200 U. S., 179.

This court, and, we believe, every member of it, have held that a condition in a contract of sale restricting competition is not affected by the Federal Anti-trust law.

Justice Peckham in case of *United States vs. Joint Traffic Assn.*, 171 U. S., uses this language:

"We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case *as a contract not within the meaning of the act*, and it was said that such contract was *collateral* to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business."

Justice Harlan, in the Northern Securities case, 193 U. S., stated the same principle as follows: "That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces all *direct* restraints imposed by any combination," etc. Justice Harlan cites the opinion of Justice Peckham in the Joint Traffic case, where the exception had been expressly stated.

Justice Brewer, concurring specially in the Northern Securities case, said that Congress did not intend to reach and destroy these minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld.

Justice Holmes, dissenting in this case, stated the same proposition in substance by declaring "That no

unison of property is a trust; a fusion of property by partners is not illegal though affecting competition."

Justice Day, who was of counsel for the government in the Northern Securities case, recognized this principle in the brief in which he joined. He says:

"The distinction between an actual *bona fide* sale and one which is merely nominal and really a cloak under which to accomplish a combination leads to confusion of language and thought."

Elsewhere in same brief he says:

"The government does not claim that ordinary corporations and partnerships formed in good faith in ordinary course of business come within the prohibitions of the act because *incidentally* they may to some extent restrict competition."

Justice Harlan had held, prior to the Northern Securities case, in the case of *Chicago, St. Louis Ry Co. vs. Pullman Co.*, 139 U. S., 79, that a condition restricting trade in a contract between the Railroad and Pullman Companies was valid.

But if there could be any doubt on this question after an examination of the Northern Securities case, it has been set at rest so far as this court is concerned in the case of *Cin. Packet Co. vs. Bay*, 200 U. S., in which Justice Holmes writes the opinion of the court, and which is concurred in by every member of the court.

Counsels for appellees, at page 31 of their brief, recognizing the controlling force of this case, attempt to avoid it by saying that the court did not have the restriction of interstate commerce before it and affirmed

it because no federal question was involved. But Justice Holmes expressly refused to affirm the case on that ground and says:

"But we do not like to put our decision upon technical reasoning where there is a fair surmise that such reasoning does not meet the realities of the case. We will suppose that the contract does not leave commerce between the states untouched."

Later he says:

"The withdrawal of the vendors from opposition for five years is the ordinary incident of the sale of a business and goodwill."

Then again:

"This being our view of the covenant in question, whatever differences of opinion there may have been with regard to the scope of the act of July 2, 1890, there has been no intimation from anyone, we believe, that such a contract, made as a part of the sale of a business, and not as a device to control commerce, would fall within the act. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute."

But the Territorial Supreme Court evince clearly that it held the contract invalid under the common law by taking and stating as the basis of its decision the case of *Oregon Navigation Co. vs. Winsor*, 20 Wall., 64, where the court say:

"It is a well-settled rule of law that an agreement in *general* restraint of trade is illegal and void, but an agreement which operates merely in *partial* restraint of trade is good provided it be not unreasonable and there

be a consideration to support it. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made."

Now, the next question for consideration, is whether this contract is void under this rule.

To be valid, it must be restricted to a *partial* restraint and not wider than the necessities of the lessee or purchaser requires.

IT WAS PARTIAL IN TWO RESPECTS.

1. It was limited in time to *the duration of the term of the lease*. The lease might be determined by the violation of several conditions thereof, but in no event could continue longer than *five years*. Therefore, in all events the restriction existed for a term not exceeding *five* years.

2. It was restricted as to place of operation. The Shawnee Company could operate at any place fifty miles removed from any plant of the Gulf Company. The Gulf Company had but two plants in the then territory of Oklahoma, which were within thirty-seven miles of each other, to-wit: At Shawnee and at Oklahoma City. It had no plant in Texas; had one in Arkansas at Little Rock, one in the Indian Territory, and one in Louisiana.

In the *Fowle vs. Park* case, 131, U. S., 88, Chief Justice Fuller held a contract valid that prohibited competition in the states of Ohio, Indiana, Illinois, Kentucky, Tennessee, Missouri, Michigan, Arkansas, Mississippi,

Alabama, Louisiana and all the territories lying west of those states together with certain counties in Virginia and Pennsylvania. This contract of lease was much more restricted than the contract construed in *Fowle vs. Park.*

The court must not overlook that clause 10 of the contract did not refer to any other *plant* of the Gulf Company, but referred solely to the one at Shawnee. In this clause the Shawnee Company obligated itself to discourage unreasonable and unnecessary competition referring exclusively to the Shawnee plant. This clause cannot be isolated without entirely destroying its purpose. The Shawnee Company desired that the Shawnee plant should be operated so as to build up its business in order that when it was redelivered at the expiration of the lease it would have a good business. This is the unquestionable construction of clause 10.

In the *Oregon Navigation Co. vs. Winsor,* 20 Wall., 68, this court expressly held the contract valid, though it embraced the whole of California.

In the *Cin. Packet Co. vs. Bay,* 200 U. S., 179, the court also held the contract valid when it embraced the whole of the Ohio river within the state of Ohio.

In *Booth vs. Davis,* 127 Fed., 875, affirmed by the Circuit Court of Appeals, 131 Fed., 31, it was held that a contract was valid where vendors agreed jointly and severally not to compete with purchaser in the territory in which the purchasers or their agents or employees *might operate.* Therefore, this contract, restricted in time and place, was only partial and valid.

The Cyclopedia states that this rule is the modern American rule, and only two states in the United States have held to the contrary. These states are Massachusetts and Indiana, and counsels for appellees cite the rule of these two courts, on page 21 of their brief. An examination of these cases shows, however, that the courts of those states do not go so far as counsels contend.

In *Bishop vs. Palmer*, 146 Mass., 469, cited by counsels for appellees, the court held that "a contract restricting competition *without any limitation of space*" was invalid. The court, however, holds in this case that such *general* restriction is *vicious*, which is contrary, as we will hereafter show, to the general rule as laid down by the courts of the states, and particularly as asserted by this court.

The Court of Indiana in *Consumers' Oil Co. vs. Nunnemaker*, 142 Ind., 560, also cited by counsels for appellees, expressly recognize the validity of a *partial* restraint, but hold the contract which it was considering so broad as to be equivalent to a *general* restriction and therefore invalid.

The case of *Western Wooden Ware Assn., vs. Starkey*, 84 Mich., 76, cited by counsels for appellees, is similar to the Indiana case. The restriction excluded the vendor from engaging in a like business in eight states, including Michigan where the factory was situated. The factory was sold, to be removed to another state, and any restriction within the state was of course unreasonable. The court say (page 83):

"The state has the welfare of all its citizens in keeping, and the public interest is the pole-star to all judicial inquiries.

"Here a large manufacturing business has been established and presumably it gave employment to quite a number of people. By the contract these people are thrown out of employment and deprived of a livelihood, and no other of the citizens of Michigan are called in to take their places. The business is no longer to be carried on here, but is removed out of the state."

The Court of Michigan cite many cases from that state showing that contracts in partial restraint are valid.

From a careful examination it is clear that the following is a correct *resume* from the decisions.

The Federal and State Courts uniformly hold that a contract in *partial* restraint of trade is valid and will be enforced.

The Federal and a majority of State Courts hold that the restrictive contract is valid though it embraces the whole of the state where the property sold or leased is situated, and other states.

A few states recognizing the boundaries of their state as an arbitrary limitation hold contracts excluding competition within the whole of the state as invalid, but this rule ignoring the wide area in which the goodwill of a business may extend is rejected by this court.

But if the contract is too comprehensive, may it not be divided and pruned of its illegal provisions and then enforced? If *divisible*, may not either of two rules be applied?

1. The whole restrictive clause be eliminated or disregarded if found invalid?

2. The restrictive clause divided and enforced within reasonable limits?

The Cyclopedia states the rule as follows (9 Cyc., 565):

"Where an agreement founded on a legal consideration contains several promises or a promise to do several things and some only of the things to be done are illegal, the promises which can be separated, or the promise so far as it can be separated, from the illegality, may be valid. The rule is that a lawful promise made for a lawful consideration is not invalid merely because an unlawful promise was made at the same time and for the same consideration. Thus if the terms of a contract in restraint of trade can be construed divisibly as to the limits, it may be valid as to the limits which are reasonable, although other limits imposed are excessive, unreasonable and void."

Rosenbaum vs. U. S. Credit System Co., 65 N. J. L., 255.
Fishell vs. Gray, 60 N. J. L., 5.
West. Union Tel. Co. vs. Bur. & S. W. Ry. Co., 11 Fed. 1, 3 McCrary, 130.
Dean vs. Emerson, 102 Mass., 480.
Thomas vs. Miles, 3 Ohio St., 274.
Lange vs. Werk, 2 Ohio St., 520.
Arnot vs. Pittson, 2 Hun., 591.

In *Rosenbaum vs. U. S. Credit System, supra*, the Court of New Jersey say, in the syllabus: "A covenant not to engage in a particular business will not invalidate the contract of which it is a part, if such contract has otherwise a legal consideration."

The *Western Union Telegraph Co. vs. Burlington & S. W. Ry. Co.*, in the Circuit Court of Iowa, decided by Circuit Judge McCrary in 1882, reported 11 Fed., page 1, is a very decisive case.

He said:

"It is not competent for a railroad company to grant to a telegraph company the exclusive right to establish lines of telegraph communication along its right of way, such contract being in restraint of trade and contrary to public policy.

"Where a contract in restraint of trade embraces several distinct promises and is divisible in its nature, the illegality of one provision which is capable of being construed divisibly will not necessarily make the entire contract null and void."

Not only could the whole provision be stricken out, if illegal, but the provision may be pruned of its illegal portions and the remainder enforced.

Navigation Co. vs. Winsor, 20 Wall., 64.
Cin. P. B. S. & P. P. Co. vs. Bay, 200 U. S., 179.
Beard vs. Dennis, 6 Ind., 200.
Pelty vs. Eichele, 62 Mo., 171.
Smith's Appeal, 113 Pa. Stat., 579.
U. S. vs. Bradley, 10 Pet., 343.
Wolsey vs. Miley, 62 Ill. App., 141.
Trenton Potteries Co. vs. Olyphant, 58 N. J. Eq., 507.

This contract could be divided so as to be valid at common law. It provided that the landlord should not compete with the tenant within fifty miles of any plant operated by tenant. It would be divisible and enforced

within fifty miles of the Shawnee plant, and the provisions with reference to other plants would be stricken out.

The lease is not *malum in se,* but invalid because it extended to too wide an area.

Malum in se is defined in Black's Law Dictionary as follows:

"Acts *malu in se,* are felonies or breaches of public duties, injuries to person or property, outrages upon public decency or good morals and breaches of official duties, when done wilfully and corruptly."

Justice Story in case of *United States vs. Bradley,* 10 Pet., 343, has given a lengthy discussion of the principle involved. He says in course of his opinion:

"There is no solid distinction in cases like the one before the court, between bonds and other deeds containing conditions, covenants or grants, not *malum in se,* but illegal at the common law; and those containing conditions, covenants and grants illegal by the express prohibitions of statutes. In each case the bond or other deeds are void, as to such conditions, covenants or grants, which are illegal; and are good as to all others which are legal and unexceptionable in their purport."

In *United States vs. Mora,* 97 U. S., 413, Justice Bradley says:

"But even if the first condition of the bond, which required the goods to be consumed in the Republic of Mexico, were not sustainable, the latter condition, which provided that no part of the goods should be transported to any place under insurrectionary control, and that none

of them should be used in any way, with the consent or allowance of the shippers or their agents, to give aid or comfort to parties in rebellion against the United States, is in exact conformity with the instructions, and is severable from the rest. On the authority of *United States, vs. Hodson*, 10 Wall, 395, and cases there relied on, the bond would be good *pro tanto*."

The Oklahoma statutes say (sec. 765 of Wilson, 1903, Revised Statutes):

"Where a contract has several distinct objects, of which one at least is lawful and one at least is unlawful in whole or in part, the contract is void as to the latter, *and valid as to the rest*."

But this contract was valid under the express language of the Oklahoma statutes, copies of which are set in our original brief on pages 27 and 28.

This is a California statute, and has been frequently construed by that court as itself dividing the contract and making the same valid as to the county where the business is located.

City Carpet Beating Works vs. Jones, 102 Cal. 506 is the strongest case. It was held that a contract there restricting competition within three counties was valid within the county where the business sold was situated, and invalid as to excess.

In *Meyers vs. Merillian*, 118, Cal. 353, in subdivision 5 of syllabus, the court said:

"An inhibition as to agency for others in a contract by one who has sold the good will of a business, engaging not to carry on a like business or to act as agent

in so doing, is within the provision of the Code permitting a contract in restraint of trade to go to the carrying on of a similar business in such case; and the language of the Code is to receive a reasonable construction so as to effect the end for which the legislature says such contract may be made and to give reasonable protection to him in whose favor such a contract is executed; and the Code provision as to the carying on of a similar business is not to be limited to the carrying of it on as owner or proprietor but is equally inclusive of the conduct of it, wholly or in part as the agent of another."

In case *Merchant Ad. Sign vs. Sterling*, 124 Cal. 429, the court said these two sections paraphrased would read:

"Every contract by which any one is restrained from exercising a lawful business is to that extent void except where he has sold the goodwill of the business, in which case, as to that or similar business he may agree not to engage so long as buyer carries on like business within the specified limits."

It will be seen that no part of the contract would be invalid except the part restricting competition and if the provision in restraint was without the statute the whole might be stricken out and the contract otherwise would be valid.

South Dakota with the same statute has given it the same construction.

Prescott vs. Bidwell, 18 So. Dak., 64.

The Court below and appellees' counsels find objection to the expression to "individually and collectively to discourage unreasonable and unnecessary competition." This of course means that the Shawnee Company will not

alone, or associated with others, compete or encourage others to compete. No stockholder signed the contract individually, so it did not obligate the stockholders.

Streichen vs. Fehleisen, 112 Ia., 49.
Booth vs. Davis, 127 Fed. 875.

In a letter written by Mr. Hanson, President of the Gulf Compress Company, to the Secretary of the Shawnee Company prior to the making of the lease, he says (page 197, Record):

"Our getting together on a lease proposition means the avoiding for each other directly or indirectly of the possibility if not the probability, of unnecessary competition." Much offense is taken by the appellees to this expression. The most that could be said of it is that he wanted to acquire the Shawnee Compress to avoid competition. This is lawful.

Booth vs. Davis, 127 Fed. 875.
State vs. Shippers Compress Co., 95 Tex. 603.
State vs. Shippers Compress Co., 67 S. W., 1049.
Trenton Potteries Co. vs. Olyphant, 58 N. J. Eq., 507.
Diamond Match Co. vs. Roeber, 106 N. Y. 473.
Gamble vs. Queens Co. Water Co., 123 N. Y. 91.
Rafferty vs. Buffalo Gas Co., 37 App. Div. 618, 56 N. Y. Sup., 288.
Oakdale Mfg. Co. vs. Garst, 18 R. I., 484.

It is not material that the price of compressing was raised.

Booth vs. Davis, 127 Fed., 875.

Or, that other parties were obligated by similar conditions.

Booth vs. Seibold, 74 N. Y. Sup., 776.

Counsels for appellees cite *More vs. Bonnet*, 40 Cal., 251, which is shown in the later California case of *City Carpet Beating, Etc., Works, vs. Jones*, 102 Cal., 506, to have been decided before the adoption of the Code and is severely criticised by Eddy on Combinations, Vol. 2, Sec. 789, and disregarded when the same question was before this court by Justice Bradley in case of *Oregon Navigation Co. vs. Winsor*, 20 Wall., 64.

The Oklahoma case of *Hulen vs. Earel*, 73 Pac., 927, has no application because in that case the partner was trying to enforce by injunction the portion of the contract outside of the statute—trying to enforce the excess—and the court properly held it could not be done.

It is asserted that the Gulf Company did not agree to operate the plant. We insist that a fair construction of its contract did obligate the Gulf Company to operate the plant.

In subdivision one, page 18, Record, it is said:

"The landlord shall deliver to the tenant its compress property in *good operating condition*, that is, with the *necessary running repairs made for the operation* of the press for the season of 1905-'06."

3. "The tenant is to pay all expenses of *operating the property*," etc. * * * *Boiler insurance to be carried by the tenant.*

Why carry boiler insurance on a boiler not *used?*

Also, all of clause 4 contemplates the operation of plant.

But clause 10 not only requires operation but the operation in a manner to increase the business at Shawnee and make same a success, and to build up a market at Shawnee for cotton.

Mr. Hanson testified that the Gulf Company operated all its presses. (Rec., page 54).

There is certainly no force in the proposition that the Gulf Company did not compete with the Atlantic Compress Company. The Atlantic Company was an organization of railroads for the purpose of compressing their own cotton. We could no more compete with the carriers in this respect than we could if we had constructed car repair shops in towns where the carriers had their own repair shops and attempted to compete with them in the repairing business. The lease did not prohibit the Shawnee Company from competing with the Atlantic Company, if it saw fit. But no competition was possible with the Atlantic, and because the Gulf Company did not do the impossible or quixotic, it is unfair to draw the inference that we had combined with it in restraint of trade.

The fact that the Gulf Company had not paid in full its capital stock—or had treasury stock unissued if you desire to call it such—cannot affect its business. It had never exchanged any of its stock for properties or leases or used any of its stock to merge or combine with other companies. It sold its stock for cash and with it purchased or leased properties as it desired.

MONOPOLY.

Is the Gulf Company, in its method of operation, a monopoly?

The court will take judicial notice of the geographical position and location of cities, towns and railroads, and the general production of counties as shown by the census reports.

Harvey vs. Territory of Okla., 11 Okla., 156.
Encyc. of Evidence, 986, 943.
Maghee vs. Camden, 45 N. Y., 514, 524.
Railway vs. State, 72 Tex., 410.
Smith vs. N. Y. Cent., 43 Barb., 225.

We exhibit with our brief a map showing the locations of the presses of the Gulf Company in the two territories, now forming the State of Oklahoma. A full understanding can be obtained from examining this map, and the table on following page formed from the Bulletin No. 76, Census Reports for 1906. It must also be remembered that the cotton in the southwest drifts to the seaport towns of Galveston and New Orleans. Also that the railroads having cotton compressed will patronize compresses on their respective lines to earn all freight charges.

(See appendix).

In the Territory of Oklahoma in 1905, the year this lease was made, there was raised 305,322 bales of cotton and in the Indian Territory 328,549 bales, a total in the two territories of 633,871 bales. In the territory embraced within a radius of fifty miles of the Muskogee plant 100,671 bales, within fifty miles of the

Shawnee plant 173,736 bales, and within fifty miles of the Oklahoma City plant 176,264 bales. But it will be seen from the map that the Shawnee territory overlaps each of the other two. It appears from the evidence that the terminal rates are too heavy to permit cotton to be transferred from one railroad to another for compression. (Record, page 87). So, not more than 1-3 of the cotton around Shawnee can be compressed at Shawnee without extra charges in terminal transfers. There are six other compresses proven to be within the restrictive field or territory of these three compresses, viz.: Sapulpa, McAlester, Ada, Pauls Valley, Chickasha, El Reno and Guthrie. But independent of any competition the whole cotton accessible to these three points is 260,624 bales. Of this number 68,329 bales are grown in counties and districts where independent presses operate. Therefore, disregarding competition except in the counties where compresses are located, the total number of accessible bales is 192,289 to be divided between three plants.

The evidence discloses (Record, pages 95 and 96), that the total expense of operating the compress at Shawnee for 1904, was between $17,500 and $18,600. We will take $18,000 as the cost of operation. It would require 36,000 bales at fifty cents per bale to pay expenses. Under the terms of our lease, we were required to pay $6,000 rental per year. To earn $6,000 we would have to compress a sufficient number of bales to net this sum, above the additional expense of compression. The Interstate Commerce Commission gives the approximate net

profit per bale, which is cited on page 33 of our original brief, at 15 or 20 cents per bale. We will take the net profit at 15 cents per bale. To earn $6,000 it would take approximately 36,000 bales to pay the rental on our plant. Interest on investment, repairs, accidents to plants and employes are legitimate items to be considered. It would have required at least 60,000 bales to have paid fixed operating expenses and rents, and secured a reasonable earning. The cotton grown in 1905 within a circle having a radius of fifty miles on either side of Shawnee, was 167,258 bales. The territory with no railroad connections with Shawnee, raised 47,715 bales. The territory with only partial connection with Shawnee raised 57,976 bales, not more than one-half of which could have been compressed at Shawnee, or at least 28,988 bales could not have been compressed in Shawnee. The counties and districts having other compresses raised 68,329 bales which we could not reasonably expect to have been compressed at Shawnee. In fact the Shawnee press, disregarding competition, had a fair opportunity of receiving for compression the cotton of Pottawatomie county, one-half of Lincoln and Payne counties, and one-half of districts 13, 17 and 18, which amounted to 64,020. Is it not probable with the Oklahoma City, Paul's Valley, South McAlester and Ada compresses in direct competition, and on the direct lines to tide water, that the Shawnee Company would have received much less than 60,000 bales? The year of 1904, the Shawnee Compress Company handled only 54,982 with a crop of 20 per cent larger than in 1905. (Record, page 105).

From this analysis, the restriction was reasonable under either of the views presented.

1st. The Shawnee Company was not excluded from two-thirds of the two territories as shown by the plat.

2nd. The restriction was not more extensive, if confined to the Shawnee press, than reasonably necessary to protect the Gulf Company.

The evidence does not establish a monopoly or monopolistic purpose of the Gulf Compress Company.

The Supreme Court of the Territory clearly committed error in directing a judgment to be entered perpetually enjoining the lease, or in case of its execution ordering the cancellation of same.

We therefore, submit the cause, believing that the Supreme Court of the Territory of Oklahoma ought to be reversed and the decree of the trial court affirmed.

B. B. BLAKENEY,
Of Counsel for Appellants.

MAPS

TOO

LARGE

FOR

FILMING